87-1806

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

In Re:

PROGRESSIVE FARMERS ASSOCIATION,
Debtor-Bankrupt.

SOUTH CENTRAL ENTERPRISES, INC., EDWIN M. LIPSCOMB FARMS, INC., CALEB LIPSCOMB and ELLEN LIPSCOMB,
Petitioners,

vs.

RICHARD FARRINGTON, TRUSTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Where the trial judge rules that an issue (the affirmative defense of waiver and estoppel) is not before the court for consideration and is not to be developed by the parties by the introduction of evidence, have the Petitioners been denied due process of law, guaranteed by the Fifth Amendment of the United States Constitution, when the Appellate Court relies on that very issue in finding against Petitioners?

II. Where, on first appellate review of a bankruptcy judge's decision, the Federal District Judge vacates and remands the decision and further sets forth the legal conclusions which must necessarily follow upon the finding of certain facts, may another Federal District Judge, on the second appellate review, refuse to follow the "law of the case" established by the Federal District Judge during the first appellate review?

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OPINIONS BELOW

The opinion of Bankruptcy Judge, Jack Jones (App. A, infra, pp. A1-A26) is not reported. The opinion of Federal District Judge William Collinson (App. B, infra, pp. A27-A36) is not reported. The opinion of Bankruptcy Judge Joe Pelofsky (App. C, infra, pp. A37-A89) is reported at 50 B.R. 525 (Bankr. W.D.Mo. 1985). The opinion of Federal District Judge Russell Clark (App. D, infra, pp. A90-A108) is not reported. The opinion of the United States Court of Appeals for the Eighth Circuit (App. E. infra, pp. A109-A124) is reported at 829 F.2d 651 (8th Cir. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1987 (App. E, infra, p. A109), and Petitioners' timely petition for rehearing en banc was denied on October 23, 1987. (App. F, infra, p. A125) Petitioners' application for extension of time to file petition for writ of certiorari was sustained by this Court. This petition for certiorari is filed within the time allowed by the order granting said application for extension of time. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

In this case, Petitioners are claiming that they have been denied due process of law guaranteed by the Fifth Amendment of the Constitution of the United States. Said Amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Contracts for the sale of "Aggieville" by Petitioners to Bankrupt were executed in December, 1975. Aggieville, located in the Missouri towns of Springfield, Liberal and Monett, consisted of a farm supply store, a grain elevator, a fertilizer plant and associated agricultural enterprises, was owned by Petitioners.

The contracts and various promissory notes required Bankrupt to pay $60,000.00 down on the purchase price of Aggieville and the remainder ($840,000.00) in monthly installments of interest and principal. Bankrupt took possession of all Aggieville assets, real and personal, and operated Aggieville from early December of 1975 until early May of 1977, when Petitioners foreclosed upon their security interests in Aggieville, and all Aggieville assets were voluntarily transferred back to Petitioners by Bankrupt. Bankrupt initiated bankruptcy proceedings on May 13, 1977.

On May 25, 1977, Petitioners filed in the Bankruptcy Court their Petition for the reclamation of all property, real and personal, which had been sold to Bankrupt. An Amended Petition was filed by Petitioners on June 13, 1977. On June 20, 1977, the Respondent-Trustee in Bankruptcy (hereinafter "Trustee") filed an Answer and Counterclaim seeking rescission of the contracts for the sale of said property, and for restitution for monies paid under the contracts and promissory notes by Bankrupt.

Petitioners based their claim for reclamation on the default by Bankrupt under the terms and conditions of the contracts, promissory notes and security agreements. Trustee defended the claim for reclamation by answering

that Bankrupt was not in default. Trustee based its counterclaim for rescission on a title problem with respect to four (4) vacant lots at the Liberal facility in Barton County, Missouri.

The action was originally tried on July 19, 1977 before the late Jack C. Jones, Bankruptcy Judge. On September 8, 1977, Judge Jones granted the Trustee rescission of the contracts. (App. A, infra, pp. A1-A26) From Judge Jones' Order, Petitioners appealed to the United States District Court, Western District of Missouri, Southern Division. On November 27, 1979, District Judge William Collinson vacated and set aside Judge Jones' Order and remanded the action for further proceedings. (App. B, infra, pp. A27-A36) Specifically, the action was remanded by Judge Collinson with instructions that the Bankruptcy Court make findings of fact as to (1) whether the Bankrupt was otherwise in default of its obligations under Part IV of the Security Agreements on or before May 9, 1977, and/or (2) whether the bankrupt was, on May 9, 1977, actually insolvent. (App. B, infra, pp. A34-A36)

Upon remand, and after several evidentiary hearings, Bankruptcy Judge Pelofsky ruled that the Trustee was entitled to rescind the contracts, and recover $458,825.10 from the various Petitioners, jointly and severally. (App. C, infra, p. A80) Judge Pelofsky found that Bankrupt was not insolvent on May 9, 1977 and was not in default of its obligations under the various security agreements. (App. C, infra, p. A80)

From Judge Pelofsky's Order, Petitioners again appealed to the United States District Court, Western District of Missouri, Southern Division. The District Court, this time by Judge Russell G. Clark, affirmed Judge

Pelofsky's Order. (App. D, infra, p. A108) However, Judge Clark rejected Judge Pelofsky's finding that PFA was not insolvent (App. D, infra, pp. A96-A103), and instead reasoned that the Trustee must prevail on his claim for rescission because Petitioners had waived their right to declare default on any ground other than non-payment of the various promissory notes. (App. D, infra, p. A103)

On October 21, 1986, Petitioners filed their appeal with the United States Court of Appeals for the Eighth Circuit seeking review of Judge Clark's Order of September 26, 1986. Appellate jurisdiction of the United States Court of Appeals was invoked under 28 U.S.C. §1291, and 158(d).

With respect to the "denial of due process" question presented to this Court, it is important to realize that during the first two days of the remand proceedings (November 22 and 23, 1982), Bankruptcy Judge Pelofsky specifically ruled that the Remand Order, entered by Judge Collinson, dictated that the remand proceedings would deal only with the issue of insolvency and whether any other event of default had occurred. (App. G, infra, pp. A126-A128)

Attorney for Trustee specifically requested that Judge Pelofsky broaden the scope of the proceedings to include the defense of waiver and estoppel of Petitioners to declare forfeiture on any ground other than non-payment. Judge Pelofsky immediately denied that request. (App. G, infra, p. A128) Therefore, Judge Pelofsky interpreted Judge Collinson's Remand Order so as to exclude the issue of waiver and estoppel, and the introduction of any evidence by either party regarding that issue. The evidentiary hearings were conducted thereafter in accordance with that ruling. Thus, the affirmative defense of waiver and

estoppel was not pled or developed by either party by virtue of the trial judge's specific ruling.

However, Judge Clark, while affirming Judge Pelofsky's decision, rejected Judge Pelofsky's grounds for the decision and substituted new and different grounds. Specifically, Judge Clark ruled that Petitioners had waived their right to declare forfeiture on grounds other than non-payment of the various promissory notes. (App. D, infra, p. A103) This was the very issue excluded from consideration by trial judge Pelofsky. Therefore, Petitioners were denied their constitutional right to defend themselves against this affirmative defense. Petitioners were thereby denied due process of law. U.S. Const. Amend. V.

With respect to the "law of the case" question presented to this Court, it is important to note that Judge Clark specifically rejected Judge Pelofsky's finding of fact that PFA was not insolvent on May 9, 1977. Although Judge Clark substituted his own finding of fact that PFA was insolvent on said date, Judge Clark refused to follow Judge Collinson's mandate that if PFA was insolvent on May 9, 1977, then Petitioners were excused from tendering title to subject real estate, and the Trustee's counterclaim for rescission must be denied. (App. B, infra, pp. A35-A36) Judge Clark refused to follow the "law of the case" established by Judge Collinson.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted to this case because the decision of the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings by the lower court, the result of which has been the denial of due process to Petitioners. The requirements of a "fair hearing" include notice of the claims of the opposing party and an opportunity to meet those claims. *F.T.C. v. National Lead Company,* 352 U.S. 419 (1957). The remand proceedings were not conducted in accordance with the fundamentals of fair play and applicable procedural standards established by law. Petitioners were led to believe that the issue of waiver and estoppel was not before Judge Pelofsky for consideration or development by the parties with evidence. However, after the hearing record was closed, Judge Clark relied on that affirmative defense as the basis for finding against Petitioners. Thus, due process was violated. *NLRB v. Homemaker Shops, Inc.,* 724 F.2d 535 (6th Cir. 1984).

In addition, Petitioners submit that the doctrine of the "law of the case" requires that judgment be entered in favor of Petitioners and against Trustee once the factual finding of insolvency was made, in accordance with Judge Collinson's Remand Order. That factual finding was made by Judge Clark as he rejected Judge Pelofsky's reasoning and factual finding of solvency. The "law of the case" doctrine should operate so as to restrain Judge Clark from affirming Judge Pelofsky's decision. *Poletti v. C.I.R.,* 351 F.2d 345 (8th Cir. 1965); *Plattner Implement Co. v. International Harvester Company of America,* 133 F. 376 (8th Cir. .....); *Donnelly Garment Company v. NLRB,* 123 F.2d 215 (8th Cir. 1941); *German v. Universal Oil*

Products Company, 77 F.2d 70 (8th Cir. 1935); *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 905 (5th Cir. 1972).

The decision below, if allowed to stand, sanctions the denial of due process otherwise guaranteed to Petitioners by the United States Constitution. Such decision sanctions a departure from the accepted and usual course of judicial proceedings by a lower court regarding a fundamental concept of a "fair hearing" to which all should be entitled.

Respectfully submitted,

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January 29, 1988

APPENDIX A

(Filed September 8, 1977)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In The Matter Of:	)	In Bankruptcy
PROGRESSIVE FARMERS	)	No. 77-30153-B-S
ASSOCIATION,	)	
Bankrupt.	)	
SOUTH CENTRAL ENTERPRISES,	)	
INC., EDWIN M. LIPSCOMB	)	
FARMS, INC. and CALEB LIPS-	)	
COMB AND ELLEN LIPSCOMB,	)	
Plaintiffs and Petitioners,	)	
-vs-	)	
RICHARD FARRINGTON, RE-	)	
CEIVER IN BANKRUPTCY,	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FACTS

The matter at issue in this case is a reclamation petition filed by South Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc., and Caleb Lipscomb and Ellen Lipscomb, his wife, against the Trustee, Richard Farrington. The Trustee has filed a Counterclaim to rescind executory contracts, between the bankrupt and the petitioners in the reclamation petition, who will hereinafter

be referred to as "Lipscomb", as Caleb Lipscomb was the moving force in all transactions and events and alleged he had authority to act for all interested sellers (Tr. 55).

Bankrupt was organized as a farm cooperative under a little used statute of the Missouri Statutes. They professed to be the direct link between the farmer and the retailer, cutting out the middle man, with the resulting advantage being in favor of the farmer. The bankrupt purchased several businesses such as a tire business, grocery stores and the one in question, among others. This business was a farm supply store, grain elevator, fertilizer plant and associated items connected with a farm supply business. By name it was known as "Aggieville" and will be hereinafter referred to as "Aggieville". Before bankrupt entered into a contract to purchase all of "Aggieville", it or its predecessor in interest had been in business approximately twenty years (Tr. 4). The business was located in Springfield, Missouri; Liberal, Missouri and Monett, Missouri. It is admitted that P.F.A. took charge of all the assets of "Aggieville" from December 1, 1975 until May 10, 1977 when Lipscomb alleges he took over "Aggieville" once again. It is not admitted, but the Court finds as a Finding of Fact that Lipscomb operated and was the general manager (Tr. 43-44) of "Aggieville" from December 1, 1975 until May 10, 1977 for the benefit of P.F.A., or as Lipscomb stated "I was there constantly overseeing it, protecting my interest as much as I could". (Tr. 44). It is admitted by the Trustee that Lipscomb is properly secured on all of the assets of "Aggieville" and that the security held by Lipscomb, if sold at a public bankruptcy sale, would bring much less than the indebtedness to Lipscomb. It is further admitted that bankrupt paid $60,000 down on said pur-

chase and gave notes and security agreements for the balance of the purchase price. Bankrupt made regular and monthly payments from the day the first monthly payment was due, up to and through April 6th and April 18th, 1977 (Tr. 30).

Each of the notes executed by P.F.A. to the sellers (plaintiff's Exhibits 5 through 12) provided for monthly installment payments on the first day of the calendar month with a 6 day grace period. In spite of such provisions, Trustee's Exhibits 2 through 8 clearly show that P.F.A. made, and the sellers accepted, late payments for every month on every note. No installment payments were ever made on the first day of the month when due (Tr. 63). These exhibits further show that the monthly installments were accepted by the sellers in some instances as late as 28 days past due date and as late as 31 days past due date. The inventory note payments totaling in excess of $22,000, due on February 1, 1977, were made and accepted by the sellers on February 28, 1977; and like payments totaling more than $20,000 were paid on March 31, 1977, for the installment payments due March 1, 1977; and installment payments totaling more than $20,000 were made by P.F.A. on April 18, 1977, for payments due April 1, 1977; the making of and acceptance of the such late payments by the sellers was clearly established as a pattern and practice and a practical modification of the contracts. Sellers never declared a default of any of the notes for late payments until May 9, 1977. Sellers never gave buyer warning in writing or otherwise that in the future a failure to pay any installment on the 1st day of the month would constitute a default.

Bankrupt paid a total of $632,719.45 to Lipscomb consisting of $470,512.34 on principle and $162,207.11 in in-

terest (Tr.107). Lipscomb claims $633,782 (Tr.183). The sale of "Aggieville" was a "package deal" of all three properties composed of "three separate entities" and the sale was treated by both parties as a package deal (Tr.55-56, 138-139). Lipscomb tied all of the notes representing the installment payments on the purchase price together and secured said notes by security agreements covering all of the personal property sold by the various sellers for the payment of the balances reflected by all of the notes combined, so that if there was a default on the payment of *any* note, *all* of the notes became due.

There is a dispute as to whether "Aggieville" made or lost money during its operation by Lipscomb from December 1, 1975 until May 6, 1977 for bankrupt. Trustee contends that he was given figures (Trustee's Ex. 1) showing the loss for that period to be $73,114.67 and that this loss is inaccurate because it did not include a warehouse bonding charge of $11,407 as an expense or interest charges or depreciation, making the loss at least twice as great as reported. Lipscomb, on the other hand, contends the latter charges should not be included in a Profit & Loss Statement (with which the Court disagrees) and that if you deduct "developmental" costs wrongfully charged to "Aggieville", that his operation for P.F.A. would show a profit of $27,000 rather than a loss of $73,114.67 (Tr.48). David Gamble, in-house accountant for P.F.A., testified that the total cash payment that bankrupt made to the "Aggieville" operation during the 17 month period was $561,267.18 and when asked whether or not "Aggieville" was a profitable or losing operation, stated that it was most certainly a losing operation. (Tr.133). The Court finds as a fact that the "Aggieville" operation of P.F.A. by Caleb Lipscomb lost a minimum

of $73,114.67. The $632,719.45 paid Lipscomb was out of capital funds supplied by bankrupt.

On May 1, 1977, bankrupt owed Lipscomb, after paying him $632,719.45 over the 17 month period, $1,243,694.48. On May 1, 1977, a payment was due and the note provided for a six day grace period (Tr.63). Late payments had been accepted on all notes (Tr.63). On the 6th day of May all of the division personnel and office equipment were moved out of the P.F.A. building to the "Aggieville" operation on 1350 St. Louis Street by Lipscomb. On the 9th of May, Lipscomb gave notice of default to bankrupt as well as a notice of foreclosure (Lipscomb Ex. 25 and 26). Bankruptcy occurred on May 13, 1977. Since May 10, 1977, Lipscomb has been operating "Aggieville" with a periodic accounting being made to the Court.

Although bankrupt took possession and control of all of the assets of "Aggieville" and owned real estate at three locations, Springfield, Monett and Liberal, no real estate was ever transferred from Lipscomb to bankrupt. The contract provided that Lipscomb was to furnish P.F.A. with a good and marketable title to the entire subject matter of the agreement with the subject matter free and clear of any and all liens and encumbrances except real estate taxes for the year 1975. (Lipscomb Ex. 1). The contract further provided that: "Buyer shall have 30 days after receipt (of abstract of title) to have the same examined by its counsel and to make objections thereto, if any, which shall be made in writing and delivered to the seller". (Lipscomb Ex. 1). In December of 1975, or January of 1976, Lipscomb delivered the abstracts of title to Robert C. Fields, counsel for bankrupt. Fields examined the abstracts in January of 1976 and stated that he found the title to Lots 14-15-16-17 in Liberal, Missouri, part of

the "Aggieville" operation in that town, still in the name of Edwin M. Lipscomb. Fields then called Jim Prewitt, Lipscomb's attorney, and told him there was a serious problem with the Liberal abstracts and suggested a conference with Prewitt and Lipscomb (Tr. 141). A conference between the aforementioned three was held in late January or the first half of February, 1976 (Tr.142). At that meeting Fields disclosed the defect in title to Prewitt and Lipscomb (Tr. 142). The situation was discussed to the effect that Caleb Lipscomb and his two sisters owned these lots, each having a one-third interest (Tr.142). However, one of the sisters, Mrs. Lasley, had a lawsuit against Caleb for money damages and (Prewitt), Lipscomb's attorney "suggested that the best way to resolve this problem would be to wait until the lawsuit was resolved, at which time, it ought to be fairly easy to obtain a Quit Claim Deed of Mrs. Lasley's interest in this property". Lipscomb evidently had purchased his other sister's interest by this time (Tr.54). Fields agreed to that procedure (Tr. 143). In December of 1976 Fields read in the paper where the lawsuit was dismissed[1] by the U.S. District Court, Western District of Missouri at Springfield, Missouri and that a week or ten days thereafter saw Lipscomb, reminded him of the previous conversation and agreement he had with Lipscomb and Prewitt and that the problem should be resolved instead of drifting (Tr.143); that about every thirty to forty-five days he would tell Lipscomb they needed to get together with Prewitt to get the matter resolved, but nothing was done. (Tr. 144). Fields further testified that part of the building in Liberal stood on these particular lots (Tr. 145); that everybody agreed

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1. The same sister has filed another and similar lawsuit against Caleb Lipscomb for money damages in Greene County, Missouri which is presently pending in Greene County.

it was a defect and a "consequential defect" (Tr. 147); that he was never asked to put his objection in writing (Tr.148). Although notice of the defect in the title was not communicated to Lipscomb in writing, the notice of the defect was timely communicated to Lipscomb and his attorney and Lipscomb knew that bankrupt was not waiving this defect as they considered it "serious" (Tr. 149).

The sellers, by their actions, acknowledged the defect and assured the buyers that they would correct and remove this defect (Tr. 141, 142, 143, 144, 149). Lipscomb never did insist on closing the deal by delivery of deeds covering the real estate and the assurances given bankrupts that they would make good and marketable title by getting Lipscomb's one sister out of the chain of title, along with Lipscomb's purchase of the interest of the other sister clearly indicates that Lipscomb was notified and knew of the problem. Lipscomb never asserted at any time that the defect was waived by bankrupts' failure to give a written statement as to the nature of the defect. Lipscomb knew what had to be done and a formal written abstract opinion addressed to him wouldn't have told Lipscomb anything that he didn't already know. Bankrupt, by not giving written notice, did not waive the defect.

Lipscomb testified that Fields one day at the water fountain in the P.F.A. Building where they both had offices, said, "I think I found a defect in one lot over at Liberal" (Tr.95), denied any conference with Fields and Prewitt in January or February of 1976, stating he was out of the country during that period (Tr. 166), and that Fields and he had subsequent conversations the same way, to the effect that there was a defect in the property at Liberal, but he never gave Lipscomb or his attorney a

list of what the defects were (Tr. 107). Prewitt, attorney for Lipscomb, did not take the stand to affirm or deny the meeting in Fields' office where the defect in title was disclosed.

No deeds to any of the real estate were ever tendered to bankrupts because all parties agreed that none of the real estate would be transferred over until the defect was taken care of since it was all one transaction and without the Liberal property, the transaction had a very serious deficiency (Tr. 149).

By May 1, 1977, bankrupt had paid on the purchase price of "Aggieville", $60,000 down and monthly payments with regularity, for a total of $632,719.45. Lipscomb moved all personnel from the P.F.A. building on May 6th and May 7th, 1977, to the "Aggieville" location at 1350 St. Louis Street. On May 9, 1977, Lipscomb gave notice of default and notice of foreclosure. Bankrupt filed its petition in bankruptcy on May 13, 1977, and a Receiver was appointed May 13, 1977. By agreement between the Receiver and Lipscomb and upon Lipscomb's request, Lipscomb has been operating "Aggieville" as his own business, making reports of that operation regularly to the Court.

On May 25, 1977, Lipscomb filed the Complaint and Petition for the Reclamation of all the property and an Amended Complaint on June 13, 1977, to which the Trustee filed an Answer and Counterclaim. To complete this picture, it should be pointed out that Farmers Market Association, a wholly owned subsidiary of P.F.A., operating six grocery stores and a hardware store, filed a Chapter XI proceeding with this Court on April 18, 1977. On May 4, 1977, this Court adjudicated Farmers Market Associa-

tion a bankrupt and appointed a Receiver the same day to take charge of its assets.

The Court also wants to note that a part of the $1,243,694.48 owed to Lipscomb on May 1, 1977, was for other business dealings with P.F.A. such as accounts receivable financing and for the purchase of twine put into inventory of P.F.A. subsequent to the initial purchase. On the accounts receivable, $50,000 was loaned by Lipscomb on July 8, 1976 (Tr.12); $60,000 on July 13, 1976 (Tr.13); and $137,687.24 on November 10, 1976, for inventory, (Tr. 14). On May 1, the $50,000 note had $45,500 due (Tr. 8); the $60,000 note, $55,500 due (Tr. 9) and the $137,687.24 (Tr.9) is as written.

On the original sale of "Aggieville", no accounts receivable were involved in the sale. When Lipscomb "took over" on May 10, 1977, "Aggieville" had accounts receivable of $222,028.75 (Tr.40). On May 10, 1977, all real estate involved in the sale was still in the name of Lipscomb. On May 10, 1977, the legal title to four lots of the Liberal "Aggieville" operation were titled in the name of Edwin Lipscomb, father of Caleb Lipscomb. Caleb Lipscomb's mother is deceased and Caleb had purchased and owned on May 10, 1977, the interest in the four lots owned by one of the sisters (Tr.54).

On May 10, 1977, and May 26, 1977, none of the real estate involved in the sale of "Aggieville" was free and clear of liens and encumbrances. "Aggieville's" real estate in Springfield, Missouri was mortgaged to Modern Security Life Insurance Company for approximately $35,000 (Tr. 69); a part of the "Aggieville" Monett real estate was encumbered by a first mortgage in the amount of $6,000 in favor of L.E. Lyons (Tr.73) and a part to the First National Bank of Monett in the amount of $35,000 (Tr.74);

and the "Aggieville" Liberal property was free and clear of liens (Tr.77).[2]

Paragraph No. 11 of plaintiff's Ex. 3 provides in the third paragraph thereof as follows:

> "Such objections, if any, made by buyer, shall be *corrected within a reasonable time. If seller cannot correct such objections, then this Agreement shall be null and void, at the option of the Buyer*". (Emphasis added).

The Court finds on May 10, 1977, "Aggieville" had an overdraft of $11,531.14 which was paid off by Lipscomb (Tr.42).

The Court finds on May 10, 1977, the real estate was worth more than it was on December 1, 1975 (Tr.53).

The Court finds the inventory of "Aggieville" on December 1, 1975, was $557,374.00; on May 10, 1977, the inventory was $660,258.00 (Tr.59).

The Court finds the fixtures and equipment owned by "Aggieville" on May 10, 1977, were the same fixtures and equipment owned by "Aggieville" on December 1, 1975, except for the 17 months depreciation involved.

The above and foregoing constituted the factual situation on May 26, 1977, when Lipscomb filed his Reclamation Petition and when Trustee filed his Reply and Counterclaim for Rescission of Contract on July 20, 1977.

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2. Lipscomb claims contrary to what the contract states, that he didn't have to pay off the mortgages against the real estate; that he was to be allowed to retain them because of the favorable 5% - 6% interest rate on these loans (Tr.70). This clearly violates the free and clear provision of the contract and that contract was never modified or changed. The Court considers these deeds of trust to be an encumbrance on the property in question and in violation of its terms, but are not grounds for rescission of the contract by trustee.

CONCLUSIONS OF LAW

It has been conceded by the Trustee that Lipscomb is properly secured and that the assets covered by the Security Agreements if sold at a public bankruptcy sale would bring far less than the claim of Lipscomb. Lipscomb has had possession of all assets of "Aggieville" since May 10, 1977.

There is only one question to be decided - namely, can the Trustee rescind the contract between bankruptcy and Lipscomb?

There isn't any question that the Trustee has the right to reject or affirm executory contracts as Section 70(b) of the Bankruptcy Code provides that within 60 days from the date of bankruptcy, the Trustee must affirm or reject all executory contracts and those not affirmed are rejected. But, the question presented here is the Trustee's right of rejection being a rescission of the contracts between the parties which entitles Trustee to a return of all payments made by the bankrupt and a return and an accounting for all of the property received by the bankrupt. Trustee alleges he has the right of rescission for failure of performance of the seller under the contract.

Lipscomb's position on rescission of the contract is: (a) no cause of action based on the right of rescission exists or ever existed; (b) that no notice of the rescission was given to Lipscomb; (c) if rescission did exist, the same has been waived by the conduct of the bankrupt, (d) that the party in default cannot claim rescission; and (e) such remedy is not available to the Trustee because he cannot restore Lipscomb to the status quo.

Taking the objections in order, the Court finds that both parties treated the sale of "Aggieville" as a package deal. None of the deeds to any of the property were to be transferred until the serious defect in the "Aggieville"-Liberal property was corrected. No "prudent business-man" would buy a business building where you received ownership to the two ends and ownership of the middle was in a third party. The Court finds and believes that the Deed of Trust on the Springfield-Aggieville property and the Monette-Aggieville property could easily have been removed and are not cause for rescission of the contract. But, the Court finds as a Conclusion of Law that P.F.A. did have a right of rescission of the contract for Lipscomb's failure to make a good and marketable title to the four lots in Liberal, Missouri.

In *Hartley* vs. *Williams*, 287 SW2d 129, vendor sold a residence for $5,000 with $500 paid down and $4,000 to be paid in installments. The contract provided when the indebtedness was reduced to $3,000 or less, then upon demand, vendor would convey title by Warranty Deed and an abstract showing good merchantable title. Vendor furnished vendee an abstract to be examined and was advised by vendee that the record title did not show good merchantable title. The vendor stated to vendee that she need not worry about it, that he would furnish good title when the time came to make the deed. Three years later, in vendor's attorney's office, when vendee wanted the deed and good merchantable title, it was stated she (Vendee) would waive all exceptions to the title except the objection to the tax title under which vendor claimed. Vendee requested vendor to file an action to have the title corrected and offered to pay half the cost. Vendor's position was that the title was

good and he would not spend one dime to have it perfected. Vendee then refused to pay any further installments; tendered the property back to vendor; and demanded all sums paid on the purchase price and for taxes, repairs, etc. The trial court allowed rescission. The appellate court on review, decided that vendor did breach the contract and that it was such a breach as would warrant a court of equity to grant rescission.

The Court said in part:

> "Our courts have held that the vendor must always furnish the exact title as called for by his contract". Aker v. Lipscomb, 300 Mo. 303; Danzer v. Moerschel, 214 SW 849; 7 A.L.R. 1162; Reeves v. Roberts, 294 Mo. 593 (pg. 134). "This breach went to the very root of the contract and, as stated by the trial court, plaintiff would not have to accept a lawsuit". (Pg. 135).

The Court, in this case, quoting an extract of the opinion in *Parsons v. Kelso,* 125 SW 227, 228 set out:

> "Since Parsons and Akers were not in a position to enforce specific performance, and could not furnish the title they had agreed to furnish, the court below followed the proper course in rescinding the contract and requiring Kelso to be placed in status quo by giving judgment in his favor for the money which he had paid. See Dahler v. Moerschel, 224 Mo.App. 815, 24 SW2d 283".

In *Kling v. A.H. Greef Realty Co.*, 148 SW 203, where purchaser chose to rescind a contract for the sale of land on the basis of a defective title, the Court held on Page 205:

> "In an action to recover purchase money paid in advance of the proffered delivery of the deed, the vendee must show that the title was bad, but where, as in the present instance, one of the duties imposed on the vendor is to deliver to the vendee, in a stated time, an abstract showing good title in him, the vendee may rescind the title on the ground of breach of such a condition . . .".

The Missouri position on this is the general rule of law. As stated in 91 C.J.S., Vendor & Purchaser, § 161:

> "The general rule in executory contracts for the sale of land is that, where the vendor has no title to convey or where there is a material defect rendering it unmarketable, the purchaser has the right to rescind the contract of sale, and the purchaser is not bound to submit to any material modification of the terms of the original contract of sale".

The evidence established that Lipscomb didn't have clear title to four lots of the Liberal tract. Lipscomb himself admitted that he knew the title wasn't good when he disclosed by his own testimony that he had purchased one of his sister's one-third interest. If Caleb Lipscomb purchased the one-third interest of one sister, he had to know that the other sister had a one-third interest and that good and marketable title to the property could not be given without her signature on a Deed to the property in question.

The evidence establishes to the satisfaction of the Court that Lipscomb and his attorney knew by oral communication from Fields, P.F.A.'s attorney, of the defect and Lipscomb felt and assured P.F.A. that there would

be no problem correcting title "after the lawsuit was settled". The actions of the buyer and sellers clearly indicated that adequate notice of the defect was given and that the failure to put the objection in writing was waived by the sellers. The law is quite clear that a contract may be modified by actions taken by the seller and buyer after the original signing of the contract which is commonly referred to in the law of contracts as modification by subsequent conduct. The Court in *Fritts v. Cloud Oak Flooring Co.*, 478 SW2d 8, Page 14 stated:

> "However, (p)arties to a contract cannot, even by an express provision in that contract, deprive themselves of the power to alter or vary or discharge it by subsequent agreement. An express provision in a written contract that no rescission or variation shall be valid unless it too is in writing is ineffective to invalidate a subsequent oral agreement to the contrary. In like manner, a provision that an express condition of a promise or promises in the contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promisor still has the power to waive the condition, or by his conduct to estop himself from insisting upon it, to the same extent that he would have had this power if there had been no such provision". 3A Corbin on Contracts, §763, p.531. See Searoad Shipping Co. v. E.I. duPont de Nemours & Co., 5 Cir., 361 F.2d 833, 837 (note 18), certiorari denied 385 U.S. 973, 87 S.Ct. 511, 17 L.Ed.2d 436; Bricker v. Great Western Accident Ass'n., 161 Iowa 61, 140 N.W. 851; General Electric Co. v. National Contracting Co., 178 N.Y. 369, 70 N.E. 928.

It is further clear from the evidence that P.F.A. was not waiving the defect in the title to land.

The Court finds the evidence establishes that P.F.A. considered the sale a package deal when they didn't take title to any of the real estate until the Liberal tract could be deeded free and clear to them. This failure to produce a good and marketable title to the four lots in Liberal, Missouri entitled the Trustee to rescind the contract under both the applicable law and the provisions of the contract.

As Bankruptcy Judge David Kline (W.D. Okla.) said in *In re Preferred Commodity Options Corp.*, Vol. 1, Bankruptcy Court Decisions (1/27/75), after considering not only the Federal Bankruptcy law, but the state law of contracts as well, held:

> "Contractual rescission or cancellation may be ordered when that which was undertaken to be performed in the future was so essentially a part of the bargain that failure of it must be considered as destroying or vitiating the contract's entire consideration".

It is admitted that no notice of the rescission of the contract was given by bankrupt to Lipscomb. This was true because bankruptcy intervened. Section 70(a)(6) of the Bankruptcy Act confers upon the Trustee all interests which the bankrupt has to "rights of action arising upon contracts". The bankruptcy receiver within sixty days of the date of bankruptcy, and promptly after learning the facts of this case, exercised his right of rescission of an executory contract by way of a Counterclaim to Lipscomb's Reclamation Petition. This constituted adequate notice of the rescission and was timely. Never did Lipscomb offer good and marketable title of all real estate to the Receiver, nor did he ever represent to the Receiver that

he had, or would, or could furnish good and marketable title to the real estate. His Reclamation Petition clearly demonstrates that he does not intend to make the title to said real estate good and marketable, taking the position that the vendee had breached his agreement and that he was entitled to all the property back, plus $632,719.45. Since Lipscomb has been unable to get his sister's one-third interest in the real estate to date, and since she sued him once for money damages in the U.S. District Court for the Western District of Missouri at Springfield, Missouri and is suing him again for money damages in the Circuit Court of Greene County, Missouri, it seems highly unlikely that she would be amenable to quit claiming her interest to her brother or to the Trustee.

It is certain that Caleb Lipscomb hasn't been able to correct the title to the Liberal real estate since he had notice not later than February of 1976 of the defect in title and has failed to make good title for sixteen months. The bankrupt and the Trustee have waited sufficient time for Lipscomb to make the title to the real estate good and marketable and his filing of his Reclamation Petition indicates that he is either unwilling or unable to ever make the title satisfactory.

The contract between the parties (Paragraph 11) expressly provided:

> "Such objections, (the defect in the title to Lots 14, 15, 16 and 17 of the Liberal, Missouri, property) if any, made by Buyer, *shall be corrected within a reasonable time. If Seller cannot correct such objections, then this Agreement shall be null and void, at the option of the Buyer*". (Emphasis added).

Lipscomb next raises the defense that if rescission did exist, the same has been waived by the conduct of the bank-

rupt; that it cannot continue to maintain its position that it owned all of the assets known as "Aggieville" until May 1, 1977, knowing full well of the defect in title to part of the real estate, and then allow the Trustee in Bankruptcy to rescind the contract following bankruptcy, when the need for its favorable provisions had disappeared; that a complaining party "cannot be permitted to chew up the sweet and spit out the bitter". Lipscomb states one may not repudiate a contract insofar as its terms are unfavorable to him and simultaneously claim its favorable benefit.

It should be noted that the bankrupt poured over a half million dollars of its operating funds into "Aggieville" during its operation and received back from "Aggieville" $91,000; that bankrupt lost at least $73,000 and more likely, twice that amount during Lipscomb's operation of "Aggieville" for bankrupt, in addition to paying Lipscomb $632,719.45 during the same period. "Aggieville" was a million dollar debacle for P.F.A. and operated in the same fashion (large losses) as other businesses to which they did have good title. There was no sweet - it was all bitter.

The evidence further established, although denied by Lipscomb, that all parties, Lipscomb, Prewitt, and Fields, agreed that perfecting the title *should be put off* until Caleb Lipscomb settled his lawsuit with his sister, when it was assumed that matters would be amicable and the title could be straightened out. In December of 1976 said lawsuit was dismissed for failure to comply with proper discovery. Between December, 1976, and bankruptcy, counsel for P.F.A. was constantly insisting that the title to the Liberal property be perfected and not let the matter drift.

The law under such facts is quite clear. Under Missouri Law, neither the use by the purchaser, nor delay in rescinding a contract, constitutes a waiver of the right to rescind where the continued use was induced by the seller. *Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Machine Co.*, 89 SW 911; *Witte v. Cooke Tractor Co.*, 261 SW2d 651. That such is the law of Missouri under appropriate factual setting appears to be established.

In *Clayton Brokerage Co. of St. Louis, Inc. v. Teleswitcher Corporation*, 555 F2d 1349, decided April 6, 1977, with Rehearing & Rehearing En banc denied June 28, 1977, Associate Justice Tom C. Clark sitting by designation with the 8th Circuit, stated in his opinion, Page 1351 in answer to defendant's contention that the right of rescission was waived by continuing use of their equipment and the payment of lease charges following discovery of the fraud:

> "(b) The Waiver Claim: Nor is there any more merit in the waiver claim. The Supreme Court has repeatedly held that there is no waiver through continued use where the lessee has no other viable alternative. Smith v. Tracy, 372 SW2d 925, Meyer v. Brown, 312 SW2d 158 (Mo.App. 1958)".

Rescission was sustained and plaintiffs recovered $53,628.13.

In this case, the bankrupt had no other viable alternative but to continue to make its payments and wait on Lipscomb's assurances that he would perfect the title to the Liberal property at some future date.

The Court finds as a Conclusion of Law that bankrupt had a right to and did rely upon the representations and

assurances of Lipscomb and his attorney that the title could and would be corrected and that bankrupt never waived the title defect. In the Case of *Fontaine v. Iying,* 202 P. 1112, 1114, the Court stated:

> "Plaintiff had the right to rely upon the assurances of (defendant vendor) and, in doing so, was justified in giving to (defendant vendor) a reasonable time within which to fulfill his assurances. While resting upon these promises, plaintiff has a right to continue with his contract, and therefore, whatever he did in the way of cropping the land, of seeking an extension of time for payment of the installment due Nov. 2, 1919 would not be any waiver of his right to rescind . . . if such assurances should not be fulfilled. *On the contrary plaintiff was not under the obligation to wait indefinitely for this matter to be adjusted,* and when, after *nearly a years time* nothing had been done to make good the *defect in title,* plaintiff had the *right* to declare rescission of the contract". (Emphasis added).

In another case rescission was held proper approximately three and a half years after the original time for performance by vendor in *Trammel v. Kemler,* 285 N.W. 196, l.c. 199, wherein the Court held that the delay was large induced by vendor's promise and representations.

In the case of *Vickers v. O'Connor,* 260 N.W. 426, in which the defense of unreasonable delay and waiver was raised and the Court held that a delay of several months after learning of the defect was not unreasonable where the buyer brought the matter to the attention of the seller who agreed to perfect the title but failed to do it. The Court in the *Vickers* case pointed out that the delay

was in response to defendant's assurance that the defect would be corrected. See also, *Rabenau v. Harrell,* 213 SW 92, *Cannon v. Bingman,* 354 SW2d 894.

Lipscomb next alleges that the Trustee cannot rescind because he steps into the shoes of the bankrupt and the bankrupt was in default on its contract on May 6, 1977, at which time Lipscomb started his take-over by moving the personnel and on the 9th and 10th of May giving bankrupt notice of his default and his intent to foreclose. P.F.A., according to Lipscomb's own testimony, had been late on their payments during the 17 months of operation. He had always accepted late payments (Exhibits 2 thru 8). These exhibits reflect that bankrupt made payments as much as 28 and 31 days after the due Date of the note. Sellers never did fail or refuse to accept late payments.

On May 6, 1977, the alleged due date for payment on the purchase price of "Aggieville", P.F.A. Market Association was in bankruptcy and P.F.A. was seven days from bankruptcy when a Trustee would be appointed for the protection of all creditors. The Court finds Lipscomb, by taking late payments from P.F.A., had waived his rights under the contract for every payment to be made on the 6th day of each and every month. Therefore, on May 9th and 10th, the purchaser wasn't delinquent and Receiver had a reasonable time to make the May payment, or rescind the contract, and he elected to rescind the contract. The Court in *Fritts v. Cloud Oak Flooring Company,* 478 SW2d 8, l.c. 12 and 13 stated:

> "Where a contract expressly provides that 'time shall be of the essence', or that in case of nonpayment of an installment on time the rights of the obligor shall be forfeited, or that in such case the obligee may declare a forfeiture, performance on time is thereby

made a condition of the obligor's reciprocal rights under the contract. But the courts do not favor forfeitures . . . "and" (t)o avoid such a forfeiture, the courts have been very astute to find and declare the existence of a waiver or an estoppel". 3A Corbin on Contracts, Sec. 754, p. 489. "Any expressions or conduct of the obligee that leads the obligor reasonably to believe that performance on time will not be insisted on will operate as a waiver of the time condition, as to subsequent defaults as well as to antecedent ones. Such a belief by the obligor may be reasonable where it is induced by the obligee's receipt of a series of delayed payments without objection". I.D. Sec. 754 at pp. 494-495.

"(A) general rule has been established that where a lessor acquiesces in the making of belated payments of rent, in departure from the express terms of his lease in that regard, for a length of time and under circumstances establishing a course of dealing upon which the lessee may, in the light of such experience, rely, the lessor cannot forfeit the lease for nonpayment of rent so represented, but must, if he desires to make use of the right to forfeit for that purpose, first warn the lessee of his intention as to future payments, and that the lessee is entitled to relief against a forfeiture otherwise attempted". 49 Am.Jur.2d, Landlord and Tenant, Section 1080, p. 1042. Cases supporting this statement are collated in annotation 31 A.L.R.2d 321, 376-383 (Sec. 16)".

"The foregoing principles have been recognized as applicable and controlling in many reported cases . . . (b) in which sellers, by their course of conduct in similarly accepting tardy payments under installment

sales contracts were held to have waived their contractual right of forfeiture for subsequent late payments without first having given the buyer similarly appropriate warning periods". (Citing a number of cases) 478 SW2d 8, l.c. 12, 13.

Under the declared Missouri law sellers had no right to declare a default and notice of foreclosure on May 9, 1977, without first having given to P.F.A. a warning of sellers intention to enforce such right of default for future tardiness in payment. Such notice was never given to P.F.A. and consequently no default existed at the time of rescission by Receiver declared in the Counterclaim filed herein. Under the contract itself the buyer had the right to declare the transaction void when no marketable title was delivered.

By May 10, 1977, bankrupt had paid Lipscomb $632,719.45 out of capital funds on the contract. This averages out over a period of 17 months to over $37,000 a month. In equity Lipscomb claims he can keep the $632,719.45 because on May 10th, P.F.A. had not made its 17th regular monthly payment by May 6, 1977. The Court finds to the contrary. On May 10, 1977, bankrupt was not in default and was entitled to make late payment as they had been accustomed to doing in the past on the purchase price notes. The bankrupt on May 10, 1977, had $632,719.45 worth of "clean hands".

Lipscomb further claims that he cannot be restored to the status quo. The Trustee can restore Lipscomb to the status quo. Lipscomb has all the real estate now, as he never deeded any of it to the bankrupt. Lipscomb readily admits that the same has increased in value. When Lipscomb sold to bankrupt, the inventory was $557,000

and when he took over on May 9, 1977, the inventory was $660,000. Technically, he is $103,000 better off in inventory, but this is not the true picture.

When bankrupt took over from Lipscomb December 1, 1975, Lipscomb had purchased and paid for $137,687.24 worth of twine. The twine arrived at various times in 1976 and was added to the inventory. Bankrupt paid Lipscomb by giving him its note for $137,687.24 which remains totally unpaid to this date. Adding $137,687.24 to the inventory purchased by P.F.A. on December 1, 1975 of $557,000, makes a total investment in inventory by Lipscomb of $694,687.24. Lipscomb thus received back $34,687.24 less in inventory than he furnished P.F.A. In addition, on May 10, 1977, Lipscomb assumed a $11,531.14 overdraft. The fixtures and equipment which were estimated by Lipscomb to be worth about $10,000 are the same, subject to reasonable wear and tear for 17 months. After the initial transaction, Lipscomb loaned bankrupt $50,000 and $60,000 on accounts receivable. At bankrupt, P.F.A. owed Lipscomb $100,000 on these two notes secured principally by accounts receivable. On May 10, 1977, Lipscomb took over the accounts receivable in the amount of $220,000. Assuming that 10% of the accounts are bad, Lipscomb has been over compensated $100,000 which adequately compensates him for the loss in inventory of $34,687.24 and any fixtures and equipment depreciation.

The cases on rescission hold that the seller is entitled to a reasonable rental and that the buyer is entitled to a reasonable interest on his money. *Cannon v. Bingman*, 383 SW2d 169. The real estate and equipment sold for $960,000. There is no evidence as to what a reasonable rental of this property is. Using the liberal figure of

10% per year rental, for one year, would be $96,000 or $8,000 per month, or $152,000 for 17 months. Lipscomb has testified that the interest paid him by bankrupt during this period was $162,207.11 which would offset a reasonable charge for rental.

The Court finds in favor of the Trustee on his Counterclaim by ordering a rescission of all contracts between the parties. The Court further finds that Lipscomb has been placed in status quo by the property being taken over by him on May 10, 1977 and that South Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc. and Caleb Lipscomb and Ellen Lipscomb, pay the Trustee severally and jointly the sum of $470,512.34, less the overdraft of $11,531.14 or a total sum of $458,825.10.

ORDERED that the judgment for $458,825.10 is to be a lien on the assets of Aggieville in the hands of South Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc., Caleb Lipscomb and Ellen Lipscomb.

A separate Judgment Entry is being entered simultaneously with these Findings of Fact, Conclusions of Law and Order.

No Order need be filed on the Reclamation Petition as Lipscomb has been in possession of all the assets of "Aggieville" since May 10, 1977 and by these Findings of Fact, and Conclusions of Law will continue to do so and the necessity of Lipscomb to report to this Court by this Order is terminated.

SO ORDERED.

DATED at Kansas City, Missouri, this 8th day of September, 1977.

/s/ Jack C. Jones
Bankruptcy Judge

(Filed September 8, 1977)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In The Matter Of:	)	In Bankruptcy
PROGRESSIVE FARMERS	)	No. 77-30153-B-S
ASSOCIATION,	)	
Bankrupt.	)	
SOUTH CENTRAL ENTERPRISES,	)	
INC., EDWIN M. LIPSCOMB	)	
FARMS, INC. and CALEB LIPS-	)	
COMB AND ELLEN LIPSCOMB,	)	
Plaintiffs and Petitioners,	)	
-vs-	)	
RICHARD FARRINGTON, RE-	)	
CEIVER IN BANKRUPTCY,	)	
Defendant.	)	

JUDGMENT

This action, having been tried by the Court, and the issues determined with a decision having been rendered this date, it is

ORDERED AND ADJUDGED that the Trustee, Richard Farrington recover from South Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc. and Caleb Lipscomb and Ellen Lipscomb, jointly and severally the sum of $458,825.10 with interest thereon from this date at the rate of 6% as provided by law, that the necessity of Lipscomb to report Aggieville's operation to the Court is terminated.

/s/ Jack C. Jones
Bankruptcy Judge

DATED: September 8, 1977

APPENDIX B

(Filed November 27, 1979)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

In the Matter of:	)	
PROGRESSIVE FARMERS	)	
ASSOCIATION,	)	
Bankrupt,	)	
SOUTH CENTRAL ENTERPRISES,	)	
INC., EDWIN M. LIPSCOMB	)	
FARMS, INC. and CALEB	)	
LIPSCOMB and ELLEN	)	
LIPSCOMB,	)	No. 77-3465-CV-S
Plaintiffs-Appellants,	)	
vs.	)	
RICHARD FARRINGTON, Trustee,	)	
Defendant-Appellee.	)	

ORDER REMANDING ACTION TO BANKRUPTCY COURT

This is an appeal from a decision of the Bankruptcy Court[1] granting rescission of a contract for the sale of an agricultural supply business from plaintiffs-appellants to the bankrupt. On review, appellants contend that the Bankruptcy Court erred in asserting jurisdiction over the Trustee's counterclaim for rescission and in granting rescission of the contract. For the reasons set forth below, the judgment of the Bankruptcy Court is vacated and the action remanded for further proceedings.

1. The late Jack Jones, Bankruptcy Judge.

This action arises out of appellants' sale of "Aggieville" to the Progressive Farmers Association (hereinafter "bankrupt"), a Missouri farm cooperative. Aggieville is located in the Missouri towns of Springfield, Liberal, and Monett, and consists of a farm supply store, a grain elevator, a fertilizer plant and associated agricultural enterprises. (Opinion at 1-2). At the time of the sale, Aggieville was owned in part by appellant Caleb Lipscomb and in part by the other appellants. It was operated by appellant Caleb Lipscomb.[2]

In early December 1975, appellants contracted to sell Aggieville to bankrupt. The Bankruptcy Court found that the contract, which was evidenced by three written agreements and promissory notes, was a "package deal." (Opinion at 2). The contract required bankrupt to pay $60,000 down on the purchase price of Aggieville and the remainder---$840,000—in monthly installments of interest and principal, which were due on the first of each month, with a five-day grace period. The contract further provided that appellants were to furnish bankrupt with abstracts of good and marketable title to the real estate. If bankrupt objected to the abstracts of title submitted to it by appellants, and if appellants were unable or unwilling to cure the alleged defect in title, then the contract might be annulled at bankrupt's option.

Bankrupt operated Aggieville from early December 1975 until early May 1977, when appellants foreclosed their security interest in Aggieville. During that period, ap-

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2. Appellant Caleb Lipscomb controlled appellants South Central Enterprises, Inc. and Edwin M. Lipscomb Farms, Inc., and was authorized to and did act for all appellants. (Opinion at 1). This Court concurs with the Bankruptcy Court's conclusion that, for the purposes of this action, appellants may be regarded as if they were one entity.

pellant Caleb Lipscomb continued to act as Aggieville's general manager.

In late December 1975 or early January 1976, appellants tendered to bankrupt abstracts of title to the Aggieville real estate. Bankrupt verbally objected to the abstract of title to the Liberal real estate, alleging that four of the lots in the center of the Liberal property were not entirely owned by appellants and that a building not subject to the contract stood on part of the Liberal real estate. The Bankruptcy Court found that after bankrupt complained to appellants about the defect in the title to the Liberal property, it agreed to appellants' proposal that the defect be cured after the resolution of a lawsuit involving the Liberal real estate. (Opinion at 6). In December 1976 that lawsuit was settled and a short time thereafter bankrupt again complained about the alleged defect in the title to the Liberal property. At about the same time, bankrupt began tendering its installment payments on the promissory notes well after the sixth of the month. Payment on the February note was made on February 28, 1977; the March payment was made on March 31, 1977; and the payment due in April was made on April 18, 1977. (Opinion at 3).

Bankrupt failed to tender the May installment payment by May 6, 1977, when—according to the written provisions of the promissory note—it was due. On May 9, 1977, appellants, stating that bankrupt was in default on its obligations, foreclosed their security interests in Aggieville. (Appellants' exhibit no. 26). Bankrupt filed its petition in bankruptcy four days later. At no time did bankrupt ever tender to appellants the May 1977 installment payment, nor did appellants ever tender to bankrupt the deeds to any of the Aggieville real estate.

On May 25, 1977, appellants filed in the Bankruptcy Court their petition for the reclamation of all of the Aggieville property. An amended petition was filed on June 13, 1977. On June 20, 1977, the Trustee in Bankruptcy filed an answer and counterclaim in which he prayed for an order of the Bankruptcy Court rescinding the contract for the sale of Aggieville from appellants to bankrupt. The action was tried in July 1977, and in September of that year the Bankruptcy Court granted the Trustee's prayer for rescission of the contract on the ground that appellants' failure to deliver good and marketable title to the Aggieville real estate entitled bankrupt to rescind. This appeal followed.

Before considering the contentions of the parties to this appeal, the Court first takes note of the nature of its role in reviewing the Bankruptcy Court's decision. The Bankruptcy Court's findings of fact are, of course, to be accepted unless they are clearly erroneous. Rules Bankr. Proc. Rule 810, 11 U.S.C. (1977); *Matter of PRS Products, Inc.*, 574 F.2d 414, 417 n. 4 (8th Cir. 1978); *First National Bank of Clinton v. Julian*, 383 F.2d 329, 333 (8th Cir. 1967). But the decisions of the Bankruptcy Court on questions of law are entitled to no presumption of correctness. *In re Knutson*, 563 F.2d 916, 917 n.1 (8th Cir. 1977); *In re Newcomb Interests, Inc.*, 171 F. Supp. 704, 706 (N.D. Cal. 1959), *aff'd* 275 F.2d 350 (9th Cir. 1960). With this in mind, the Court turns to a consideration of the legal and factual issues presented by this appeal.

The first question before the Court is whether the Bankruptcy Court erred in exercising summary jurisdiction over the Trustee's counterclaim for rescission. The

controlling provision of the Bankruptcy Act is § 23(b), 11 U.S.C. § 46(b) (1953), which reads in part as follows:

> Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, *unless by consent of the defendant* . . . (emphasis supplied).

The Trustee contends, and appellants deny, that appellants consented to the summary jurisdiction of the Bankruptcy Court.

The record reflects that appellants voluntarily submitted to the Bankruptcy Court their petition for the reclamation of Aggieville, that the Trustee filed an answer and counterclaim in which he prayed for rescission of the contract, and that appellants responded to the Trustee's counterclaim by means of a reply which addressed the merits of the Trustee's contentions, but which did not raise any jurisdictional objection or defense. Nor did appellants make any jurisdictional objection at trial. It was only on November 22, 1977, some four months after trial, that appellants, in their amended designation of contents for inclusion in the record and statement of issues on appeal, made their first objection to jurisdiction.

The Bankruptcy Court has jurisdiction over counterclaims which are reasonably related to claims submitted by a creditor in a bankruptcy proceeding. In *Floro Realty & Investment Co. v. Steem Electric Corp.*, 128 F.2d 338, 340 (8th Cir. 1942), the Court, applying § 23(b), stated that

> [the claimant] having submitted to the court its claim for possession of the property involved, brought

> to the court for determination not only the questions which it deemed germane to its rights of possession but also all questions of defense which would be lawfully interposed, and cannot thereafter withdraw, but that court has jurisdiction thereupon to determine all controversies in relation to the claim thus submitted.

See Inter-State National Bank of Kansas City v. Luther, 221 F.2d 382 (10th Cir. 1955); 2 W. Collier, *Bankruptcy*, ¶ 23.08 (14th ed. 1976). The Trustee's counterclaim for rescission is reasonably related to appellants' petition, and the facts in this case clearly demonstrate that appellants consented to the summary jurisdiction of the Bankruptcy Court over the Trustee's counterclaim for rescission of the contract. Accordingly, the Court holds that the Bankruptcy Court properly exercised summary jurisdiction over the Trustee's counterclaim.

The second issue before the Court involves the nature and extent of the Trustee's rights in this action. Section 70(a)(6) of the Bankruptcy Act, 11 U.S.C. § 110(a)(6) (1953), endows the Trustee with the bankrupt's "rights of action arising upon contract" as of the date the petition in bankruptcy is filed. In exercising the powers vested in him by operation of § 70(a)(6), the Trustee stands in the shoes of the bankrupt and may bring only those actions which the bankrupt might have brought had it remained solvent. *Cissell v. American Home Assurance Co.*, 521 F.2d 790, 792 (6th Cir. 1975), *cert. den.* 423 U.S. 1074 (1976). It is well settled that state law governs the rights of the parties in actions on contracts. Accordingly, the Court holds that the parties' contractual rights and remedies are governed by Missouri law. *See*

McDonnell v. American Leduc Petroleum, Ltd., 456 F.2d 1170, 1177 (2d Cir. 1972); 4A W. Collier, *Bankruptcy*, ¶ 70.28 at 380-381 (14th ed. 1978).

The Court begins its analysis of the parties' rights by addressing the question whether appellants were, on May 9, 1977, entitled to foreclose their security interests in Aggieville. If the answer to this question is in the affirmative, then appellants' further performance was excused and the Trustee's counterclaim for rescission should have been denied. *See Burns v. Beeny*, 427 S.W.2d 772, 775 (Mo. App. 1968).

The contract for the sale of Aggieville provided that "(i)f Buyer defaults on either of said notes, then Seller may retake said assets in accordance with said security interests . . ." (Appellants' exhibits 1, 2, and 3). Security interests in certain Aggieville assets were granted by bankrupt to appellants in four 1976 security agreements. (Appellants' exhibits 4 through 7). Save for the description of collateral and the names of the secured parties, these agreements are identical. In Part IV, the agreements provide, in part:

> Debtor shall be in default under this agreement upon the happening of one or more of the following events:
>
> 1. Default in the payment or performance of any obligation, covenant or liability of the Debtor contained or referred to herein . . .
>
> * * *
>
> 3. (T)he danger of misuse or confiscation of the collateral in the opinion of the Secured Party . . .
>
> 4. Insolvency, business failure, appointment of a receiver of any part of the property of . . ., or

> the commencement of insolvency by or against Debtor . . .

Pursuant to Part V of the security agreements and §§ 9-501(1) and 9-503 of the Uniform Commercial Code, R.S. Mo. §§ 400.9-501(1) and 400.9-503 (1959), appellants were entitled to foreclose their security interests upon the debtor's default as defined in Part IV of the security agreements. They are also entitled under the contract of sale to retake Aggieville if bankrupt failed to make timely payments on the promissory notes.

Appellants argue that bankrupt was in default of its contractual obligations because it failed to tender the May 1977 installment payment on or before May 9, 1977. The Bankruptcy Court found that appellants, by previously accepting bankrupt's late payments, waived their right to payment by the 6th of the month, and that the contract was thereby modified[3] to permit bankrupt a reasonable time in which to make the monthly payments. (Opinion at 3, 19). These findings of fact are supported by substantial evidence and are not clearly erroneous; accordingly, this Court holds that bankrupt's failure to tender the May 1977 installment payment by May 9, 1977, was not a default entitling appellants to foreclose their security interests. Rules Bankr. Proc. Rule 810.

The Bankruptcy Court, however, failed to make findings of fact as to whether bankrupt was otherwise in default of its obligations under the security agreements.

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3. Ordinarily, where the Statute of Frauds, R.S. Mo. § 432.010 (1949), governs a contract, any modification of the contract must be in writing and signed by the party against whom it is to be used. Gee v. Nieberg, 501 S.W.2d 542, 545 (Mo. App. 1973). The Statute of Frauds, being an affirmative defense, is waived if not timely asserted. Smith v. Hainline, 253 S.W. 1049, 1052 (Mo. 1923). By failing to raise the defense of the Statute of Frauds, appellants waived the defense.

This action will therefore be remanded so that the Bankruptcy Court may determine whether any of the events constituting default under Part IV of the security agreements took place on or before May 9, 1977. If the Bankruptcy Court finds that bankrupt was in default of its obligations under the security agreements, then appellants must be held to have been entitled under Part V of the agreements and under § 9-501(1) of the Uniform Commercial Code, R.S.Mo. § 400.9-501(1) (1959), to foreclose their security interests in the collateral described in those agreements. If appellants were entitled on May 9, 1977, to foreclose their security interests in that collateral, then the Trustee's counterclaim for rescission must be denied.

The Bankruptcy Court also failed to make findings of fact as to whether bankrupt was in default under any provisions of the contract for the sale of Aggieville. Under present Missouri law, actual insolvency of a party to a contract may be an anticipatory breach of contract excusing further performance by the solvent party. Although an early case, *Cornett v. Best,* 151 Mo. App. 546, 132 S.W. 35 (Mo. App. 1910), is to the contrary, the law in this state is that insolvency may, but does not always, excuse further performance by the solvent party. *First State Bank v. Reorganized School District R-3, Bunker,* 495 S.W.2d 471, 479 (Mo. App. 1973). *See also Central Trust Co. v. Chicago Auditorium,* 240 U.S. 581, 591 (1916); S. Williston, *Contracts,* §§ 1308, 1324 (3d ed. 1968); *Restatement of Contracts* § 287(1), (1932); 17 Am. Jur. 2d., *Contracts,* § 430 (1964). This Court holds that if bankrupt were insolvent[4] on May 9, 1977, appellants were ex-

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4. "Insolvency" for the purposes of this inquiry means ". . . inability to pay debts as they come due in the ordinary course of business." Bushman v. Bushman, 279 S.W. 122, 126 (Mo. 1925); Adams v. Richardson, 337 S.W.2d 911, 916 (Mo. 1960).

cused from the duty of tendering title to the real estate, and the Trustee's counterclaim for rescission must be denied. This cause will therefore be remanded to the Bankruptcy Court for a finding of fact as to whether the bankrupt was, on May 9, 1977, actually insolvent.

It is accordingly

ORDERED that the judgment of the Bankruptcy Court be, and it hereby is, vacated, and this action be, and it hereby is, remanded for further proceedings not inconsistent with this Opinion.

/s/ William R. Collinson
District Judge

Dated: November 27, 1979.

APPENDIX C

(Filed June 12, 1985)

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

IN RE:	)	
PROGRESSIVE FARMERS ASSOCIATION,	)	Case No. 77-30153-B-S
Debtor.	)	
SOUTH CENTRAL ENTERPRISES, INC., EDWIN M. LIPSCOMB FARMS, INC., and CALEB LIPSCOMB and ELLEN LIPSCOMB,	)	
Plaintiffs,	)	
vs.	)	
RICHARD FARRINGTON, Trustee,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This case arises under the Bankruptcy Act, July 1, 1898, 30 Stat. 544, now repealed. Generally jurisdiction is retained by this Court under the provisions of Section 403(a) of Pub.L. 95-958, Title IV, Nov. 6, 1978, 92 Stat. 2683, despite the repeal of the Bankruptcy Act. The various creditors filed a reclamation petition in the Bankruptcy Court and the trustee filed a counterclaim for rescission. The matter was tried and appealed. The District Court remanded the proceeding for further findings. Extensive hearings were held and the evidence and briefs were submitted to this Court for ruling.

I

Debtor was organized to market various products to farmers. As part of that sales effort it agreed to purchase from Caleb and Ellen Lipscomb, husband and wife, South Central Enterprises, Inc., a Missouri corporation, and Edwin M. Lipscomb Farms, Inc., a Missouri corporation, hereinafter Lipscomb, various businesses and properties owned by the entities. Although some of the transactions were never closed, debtor operated the businesses and the properties until shortly before it filed bankruptcy when Lipscomb attempted to accelerate the obligations and reclaim the properties.

In the amended complaint for reclamation filed June 3, 1977, Lipscomb pleaded that he had conveyed certain assets, real and personal, to debtor and that "Petitioners took possession of said property by reason of default in said promissory notes on May 9, 1977. In Count I he prayed for return of the Aggieville Springfield personal property. In Count II, he prayed for, inter alia, reclamation of "the real property known as 601 and 701 Front Street, Monett, Missouri" and Count III for, inter alia, reclamation of "the real estate known as Aggieville Store and Lipscomb Elevator, Liberal, Missouri". The evidence only shows notice of default on that date and a demand for possession. It also shows Lipscomb ousted by PFA a few days earlier. The evidence does show Lipscomb operating on May 10, 1977, Transcript May 13, 1977, p. 9-10, 2nd partial. Possession at the date of filing was under the auspices of the receiver appointed by the Court. In addition, the evidence shows on May 9, 1977, that debtor had possession of all the property, real and personal, described in the petition but that Lipscomb had never delivered title to the real property. Transcript May 13,

1977, p.16-17, 2nd partial. The trustee answered and counterclaimed for rescission alleging petitioners had breached the contract of sale and misrepresented their ability to deliver clear title causing substantial prejudice to debtor.

The Bankruptcy Court heard the reclamation petition and the counterclaim in rescission and found in favor of the trustee and awarded the trustee the sum of $458,825.10 as the difference between reasonable rentals and payments received by Lipscomb. The Court denied reclamation finding that the properties had been in the hands of Lipscomb since before the filing of the bankruptcy. Lipscomb appealed.

The District Court held that the Bankruptcy Court properly exercised its jurisdiction as Lipscomb had consented. Pages 4 and 5, opinion dated November 27, 1979, citing §23(b) of the Act, §46(b), Title 11, U.S.C. The District Court also found that there was no default on the contractual obligations due Lipscomb.

> "Appellants argue that bankrupt was in default of its contractual obligations because it failed to tender the May 1977 installment payment on or before May 9, 1977. The Bankruptcy Court found that appellants, by previously accepting bankupt's late payments, waived their right to payment by the 6th of the month, and that the contract was thereby modified to permit bankrupt a reasonable time in which to make the monthly payments. (Opinion at 3, 19). These findings of fact are supported by substantial evidence and are not clearly erroneous; accordingly, this Court holds that bankrupt's failure to tender the May 1977 installment payment by May 9, 1977, was not a default

entitling appellants to foreclose their security interests. Rules Bankr. Proc. Rule 810". Page 7, opinion dated November 27, 1979.

The District Court, however, went on to discuss issues that arose from an examination of the relevant Missouri law and the underlying documents. The District Court found that:

"The Bankruptcy Court, however, failed to make findings of fact as to whether bankrupt was otherwise in default of its obligations under the security agreements. This action will therefore be remanded so that the Bankruptcy Court may determine whether any of the events constituting default under Part IV of the security agreements took place on or before May 9, 1977. If the Bankruptcy Court finds that bankrupt was in default of its obligations under the security agreements, then appellants must be held to have been entitled under Part V of the agreements and under §9-501(1) of the Uniform Commercial Code, R.S. Mo. §400.9-501(1) (1959), to foreclose their security interests in the collateral described in those agreements. If appellants were entitled on May 9, 1977, to foreclose their security interests in that collateral, then the Trustee's counterclaim for recission [sic] must be denied.

The Bankruptcy Court also failed to make findings of fact as to whether bankrupt was in default under any provisions of the contract for the sale of Aggieville. Under present Missouri law, actual insolvency of a party to a contract may be an anticipatory breach of contract excusing further performance by the solvent party. Although an early case, *Cornett v. Best*,

151 Mo. App. 546, 132 SW 35 (Mo. App. 1910), is to the contrary, the law in this state is that insolvency may, but does not always, excuse further performance by the solvent party. *First State Bank v. Reorganized School District R-3, Bunker,* 495 S.W.2d 471, 479 (Mo. App. 1973). *See also Central Trust Co. v. Chicago Auditorium,* 240 U.S. 581, 591 (1916); S. Williston, *Contracts,* §§1308, 1324 (3d ed. 1968); *Restatement of Contracts* §287(1), (1932); 17 Am.Jur.2d., *Contracts,* §430 (1964). This Court holds that if bankrupt were insolvent on May 9, 1977, appellants were excused from the duty of tendering title to the real estate, and the Trustee's counterclaim for rescission must be denied. This cause will therefore be remanded to the Bankruptcy Court for a finding of fact as to whether the bankrupt was, on May 9, 1977, actually insolvent". Page 7-8, opinion of November 17, 1979.

Judge Jones passed away in November of 1979. This writer was sworn in as his successor in May of 1980. A review of the trial transcripts revealed that Lipscomb had pleaded that debtor was *solvent* on the day notice of default was given and that neither party had introduced evidence on the question of debtor's solvency. Thereafter Lipscomb requested an opportunity to present additional evidence which was granted.

II

The transactions out of which this litigation arose were memorialized by agreements dated December 5, 1975, and instruments executed thereafter. The agreements were executed by debtor as buyer, on the one hand, and Caleb Lipscomb and Ellen Lipscomb, South Central Enterprises, Inc. and Edwin M. Lipscomb Farms, Inc., as

sellers. Lipscomb personally, with his wife, owned all of the entities in one fashion or another. The properties sold were Lipscomb Agricultural Supply, Lipscomb Elevators and Aggieville. Excluded from the sale was "the real property and appurtenant fixtures located at 1120 East Trafficway, Springfield, Missouri" and certain land and appurtenances owned by Lipscomb Farms, together with some accounts receivable.

For their interests the Lipscombs received $200,000 of which $13,333,33 was paid in cash, the balance to be represented by a note, "dated as of the date of transfer of the real property provided for herein". South Central Enterprises, Inc., was paid $450,000 for its interests of which $30,000 was cash and the balance to be evidenced by a note "dated as of the date of transfer of the real property provided for herein". Edwin M. Lipscomb Farms, Inc., was to receive $250,000 of which $16,666.67 was paid in cash and the balance to be evidenced by a note "dated as of the date of transfer of the real property provided for herein".

The notes called for in the agreements were executed in January of 1976. Two deeds of trust were executed in April of 1976 but never recorded. The property in which sellers took a security interest was located in Monett, Barry County, and Springfield, Greene County, Missouri. Apparently no security interest in the Liberal, Missouri, property was created. Judge Jones, in his Order of September 8, 1977, found that "no real estate was ever transferred from Lipscomb to bankrupt". P.4, September 8, 1977 Order. The Court noted that there was a substantial defect in the title to the Liberal property and that debtor had not waived the defect. The finding

that sellers never conveyed the real estate to debtor was not disturbed on appeal.

All of the agreements for sale contained warranties of good and marketable title. The agreements also provided that the real estate closings were to occur in January of 1976. The agreements contained only nominal penalties for default but made reference to provisions in the security agreements. The deeds of trust contained provisions for foreclosure upon default. The notes provided that the holder could, at his option, declare all installments due if there was a default as to payment.

The various security agreements described both events of default and the rights and remedies of the secured parties.

"IV EVENTS OF DEFAULT

Debtor shall be in default under this agreement upon the happenings of any one or more of the following events:

1. Default in the payment or performance of obligation, covenant or liability of the Debtor contained or referred to herein, or of any endorser, guarantor or surety for any liability of the Debtor to Secured Party.

2. Any warranty, representation or statement made or furnished to Secured Party by or on behalf of the Debtor for the purpose of obtaining credit or an extension of credit proves to have been false in any material respect when made or furnished.

3. Loss, theft, damage, destruction, or the danger of misuse or confiscation of the Collateral in the

opinion of Secured Party, or sale or encumbrance to or of any of the Collateral, or the making of any levy, seizure or attachment thereof or thereon or the issuance of an injunction with respect to the use or sale thereof.

4. Death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against, Debtor or any endorser, guarantor or surety for Debtor".

"V SECURED PARTY'S RIGHTS & REMEDIES

1. Secured Party shall have the right to notify account and contract debtors obligated on any or all of the Collateral to make payment thereof directly to Secured Party and Secured Party may take control of all proceeds of any of the Collateral, which rights Secured Party may exercise at any time whether or not Debtor is then in default. Until such time as Secured Party elects to exercise such rights, Debtor is authorized, as agent of Secured Party, to collect and enforce all such contracts and accounts. The cost of such collection and enforcement, including attorney fees and expenses shall be borne by Debtor whether the same is incurred by Secured Party or Debtor.

2. Upon the occurrence of any of the above events of default and at any time thereafter (such default not having previously been cured), Secured Party shall have, in addition to all other rights and remedies the remedies of a secured

party under the Uniform Commercial Code. Secured Party may, at its option, require Debtor to assemble the Collateral and make it available to Secured Party at a place, to be designated by Secured Party, which is reasonably convenient to both parties, or in the event Debtor fails or refuses to so assemble the Collateral, Secured Party shall have the right, and Debtor does hereby authorize and empower Secured Party to enter upon the premises wherever the Collateral may be in order to remove the same. Unless the Collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, Secured Party will give Debtor reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or other intended disposition thereof is to be made. The requirement of reasonable notice shall be met if such notice is mailed, postage prepaid, to the address of Debtor set forth at the beginning of this agreement at least five days prior to the date of sale or disposition.

3. Secured Party may at any time in its sole discretion transfer any securities or property constituting Collateral into its own name or that of its nominee and receive the income therefrom and hold the same as security for liabilities of Debtor to it or apply the Collateral on principal and interest due on such liabilities.

4. Insofar as the Collateral shall consist of accounts receivable, insurance policies, instruments, chattel paper, things in action or the like, Secured Party may demand, collect, receipt for, settle,

compromise, adjust, sue for, foreclose or realize upon the Collateral as the Secured Party may determine, whether or not liabilities of Debtor hereunder are then due, and for the further purpose of realizing Secured Party's rights therein, Secured Party may receive, open and dispose of mail addressed to Debtor and endorse notes, checks, drafts, money orders, documents of title or other evidences of payment, shipment or storage or any form of the Collateral on behalf of and in the name of Debtor.

III

Lipscomb originally brought this proceeding in the Bankruptcy Court. On appeal Lipscomb challenged the Bankruptcy Court's exercise of summary jurisdiction over the trustee's counterclaim. That challenge was rejected. Lipscomb, in that appeal, raised no question as to the court's authority to consider the complaint in reclamation. During the course of the trial on remand Lipscomb objected to this Court's jurisdiction based upon the decision of the Supreme Court in *Northern Pipeline Const Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858 (1982). This Court denied the objection and a motion for leave to file an interlocutory appeal to the District Court was denied by the District Court on November 29, 1982. Lipscomb persists in the objection.

In the objection to jurisdiction Lipscomb contends that the questions of insolvency and of anticipatory breach are issues of state law and require the exercise of judicial power, outside the authority of a bankruptcy judge in light of the holding in *Marathon*, supra. A careful analysis of the pending case shows that *Marathon* and the resulting

rules and legislation creating the existing jurisdiction arrangement compels the conclusion that this Court has jurisdiction of all of the issues pending in this proceeding.

Original jurisdiction "of all matters and proceedings in bankruptcy", as those arose under the Bankruptcy Act of 1898, was vested in the United States District Court. Section 1334, Title 28, U.S.C. June 25, 1948, c.646, 62 Stat. 931. In the Act, a court was defined to "mean the judge or the referee of the court of bankruptcy in which the proceedings are pending, Section 1(9) of the Act, Section 1(9), Title 11, U.S.C., and "courts of bankruptcy" were defined to "include the United States district courts . . . to which this Act is or may hereafter be applicable". Section 1(10) of the Act, Section 1(10), Title 11, U.S.C.

The courts of bankruptcy were "invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to -

> "(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . . and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed . . . he shall be deemed to have consented to such jurisdiction . . .". Section 2(a) and 2(a)(7) of the Act, Section 11(a) and 11(a)(7), Title 11, U.S.C.

Jurisdiction over controversies at law or in equity, "as distinguished from proceedings under this Act "was

placed in the district court. Section 23 of the Act, Section 46, Title 11, U.S.C. Such jurisdiction arises when a claimant holds a substantive, adverse claim to that of the trustee. But an adverse party could consent to jurisdiction before a referee, *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 52 S.Ct. 505 (1932) and an adverse party consented to the referee's jurisdiction by voluntarily invoking that jurisdiction. *Page v. Arkansas Natural Gas Corporation*, 286 U.S. 269, 52 S.Ct. 507 (1932).

In *Cline v. Kaplan*, 323 U.S. 97, 65 S.Ct. 155 (1944) the Supreme Court held that an adverse party who timely objected to summary jurisdiction and maintained that objection throughout the proceeding even while participating, by necessity, did not waive the objection to jurisdiction. To deal with the ambiguity created by the holding in *Cline*, supra, as to when an objection could be preserved, the Congress amended Section 2(a)(7) of the Act to require a creditor to file an early objection or to be found to have waived the objection. 2 Collier on Bankruptcy paragraph 23.08, pp.544-45 and n.47 (14th Ed.).

At the time this proceeding was initiated, therefore, the law was well settled.

> "Bankruptcy Courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession." *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481, 60 S.Ct. 628, 630, 84 L. Ed. 876 (1940).

Here, at the time the bankruptcy case was filed, the trustee had constructive if not actual possession of the property which Lipscomb sought to reclaim. The reclama-

tion petition alleged that "pursuant to order of this Court since May 13, 1977 Caleb Lipscomb has operated the business known as Aggieville . . . under the direction of said Receiver . . ." [and prayed] "that the said Receiver be directed to surrender and deliver to [Lipscomb] all of the said goods, property and assets aforesaid . . ."

The proceeding was filed by Lipscomb in the bankruptcy court. The trustee then filed a counterclaim. The Supreme Court has noted that the jurisdictional limits do not restrict the right of a trustee to protect possession or title. *Ex Parte Baldwin,* 291 U.S. 610, 54 S.Ct. 551 (1934). Even in *Cline,* supra, the Supreme Court recognized consent jurisdiction.

> "Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure to make timely objection. . . . Consent is wanting where the claimant has throughout resisted . . . and where he has made formal protest against the exercise of summary jurisdiction . . .". *Cline,* supra, at 323 U.S. at 99, 65 S.Ct. at 156.

The reclamation proceeding was ruled and appealed. It was only after hearings on the remanded narrow issue began that Lipscomb objected to jurisdiction of this Court. The Court finds that Lipscomb consented to the exercise of jurisdiction by this Court. *Matter of Veelock Mfg. Co., Inc.,* 26 F.Supp. 110, aff'd 102 F2d 993 (3rd Cir. 1939); *Matter of Bankers Trust Co.,* 566 F2d 1281 (5th Cir. 1978); *In re Behring and Behring,* 445 F2d 1096 (5th Cir. 1971); *Matter of Citizens Loan & Sav. Co.,* 16 BR 157 (DC WD Mo. 1981).

The Supreme Court's holding in *Northern Pipe Line*, supra, does not alter this result. In that case the Supreme Court dealt with the question of subject matter jurisdiction which had, by statute, been granted to the district court, Section 1471(b), Title 28, U.S.C. and then "poured over" to the bankruptcy court. Section 1471(c), Title 28, U.S.C.

> "We conclude that 28 U.S.C. §1471 (1976 ed. Supp IV) as added by §241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained . . . *Northern Pipe Line*, supra, 102 S.Ct. at 2880

But this proceeding did not arise under the statute enacted in 1978. The holding in *Northern Pipe Line*, supra, reaches only the grant of independent jurisdiction to a bankruptcy court. It does not touch on the question of the validity of the kind of derivative jurisdiction exercised by referees under the Bankruptcy Act of 1398. If anything, the *Northern Pipe Line* decision and its judicial and legislative progeny, together with the cases discussing magistrate jurisdiction, persuade that the jurisdictional pattern of the Act is sound.

Reacting to the voiding of the grant of jurisdiction the various Judicial Circuits adopted in 1982 an "Interim Rule" for the management of bankruptcy cases and proceedings. The Rule recognized that jurisdiction was in the district court and provided that—

> "All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases

under Title 11 are referred to the bankruptcy judges of this district". Section (c) of the Interim Rule.

Other provisions in the Rule permitted the bankruptcy court to exercise most of the authority previously conferred by statute. The Interim Rule was adopted in this judicial circuit and the jurisdictional pattern was confirmed by the Eighth Circuit. *In re Hansen*, 702 F2d 728 (8th Cir. 1983).

The jurisdictional turmoil was put to rest by the 1984 amendments to Title 28 and the Bankruptcy Code. In those amendments the Congress provided that—

"(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Section 1334(a) and (b), Title 28, U.S.C.

"Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district". Section 157(a), Title 28, U.S.C.

Essentially the jurisdiction pattern promulgated by the 1984 amendments followed that created by the Interim Rule and, more importantly, both mirror the jurisdictional arrangement contained in the 1898 Act. The district court has jurisdiction which is referred to the bankruptcy court

with some exceptions not pertinent here. The reclamation petition filed by Lipscomb and the trustee's counterclaim would be core proceedings under the statute. Sections 157(b)(2)(C),(K) and (O), Title 28, U.S.C. No court has yet ruled the validity of this jurisdictional arrangement.

There are cases in similar areas. Within the federal court system, magistrates, although not Article III appointees, perform judicial functions by reference from the district court. The references are authorized by statute. Section 636, Title 28, U.S.C. With the consent of the parties, the magistrate "may conduct any or all proceedings in a . . . civil matter and order the entry of judgment in the case . . ." Section 636(c)(1), Title 28, U.S.C.

The Supreme Court has sustained the validity of the reference to the magistrate. In *United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), the issue was raised when a defendant challenged the absence of a *de novo* hearing before the district court on his motion to suppress. The Supreme Court rejected the argument on both statutory and constitutional grounds.

> "Congressional intent, therefore, is unmistakable. Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions. See S.Rep., at 6, H.R. Rep., at 8. The legislative history discloses that Congress purposefully used the word *determination* rather than *hearing*, believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the district court judge. And, in providing for a "de novo determination" rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion,

chose to place on a magistrate's proposed findings and recommendations. See *Mathews v. Weber*, 423 U.S. 261, 275, 96 S.Ct. 549, 556, 46 L.Ed.2d 483 (1976)". 447 U.S. at 676, 100 S.Ct. at 2412-13.

"We conclude that the due process rights claimed here are adequately protected by §636(b)(1). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude that the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself. 447 U.S. at 680-681, 100 S.Ct. at 2415.

"In passing the 1976 amendments to the Federal Magistrate Act, Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates. Accordingly, Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction.

"We need not decide whether, as suggested by the Government, Congress could constitutionally have delegated the task of rendering a final decision on a suppression motion to a non-Art. III officer. See *Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973). Congress has not sought to make any such delegation. Rather, Congress has pro-

> vided that the magistrate's proposed findings and recommendations shall be subjected to a *de novo* determination "by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order." S.Rep., at 3. Moreover, "[t]he authority - and the responsibility - to make an informed, final determination . . . remains with the judge". [citation omitted]. 447 U.S. at 681-682, 100 S.Ct. 2415.

The constitutionality of the referral to magistrates was challenged after *Raddatz*, supra, based upon language contained in *Northern Pipe Line*, supra. The challenge has been rejected by various courts, including the Court of Appeals for this Circuit. *Lehman Bros Kuhn v. Clark Oil & Refining*, 739 F2d 1313 (8th Cir. 1984). See also *Pacemaker Diagnostic Clinic of America v. Instromedix*, 725 F2d 537 (9th Cir. 1984); *Collins v. Foreman*, 729 F2d 108 (2d Cir. 1984). In each of those cases the court rejected an attack on the constitutionality of the procedure of the reference to magistrates which was based upon the language of *Northern Pipe Line*.

This Court concludes, therefore, that a jurisdictional arrangement which is within the control of the Article III court meets constitutional tests of due process and satisfies the requirement that the judicial power of the United States be exercised by an Article III appointee unless the parties agree to another procedure. The holding in *Northern Pipe Line*, supra, does not alter that result. Here the Court finds that Lipscomb consented to the exercise of plenary jurisdiction by the bankruptcy court and made no timely objection to that jurisdiction. The Court holds that it has jurisdiction to enter judgment in this proceeding.

IV

Having concluded that it has jurisdiction of the issues raised in this proceeding, this Court must examine the evidence to determine whether Lipscomb was entitled to prevail against the trustee on any of the grounds raised by the District Court, although not necessarily pleaded by the parties. The first of these is default under the security agreements or under §9-501(1) of the Uniform Commercial Code, R.S. Mo. §400.9-501(1).

The various security agreements describe four categories of events which may be considered defaults. The first of these is "[d]efault in the payment or performance of any obligation, covenant or liability of the Debtor contained or referred to herein . . .". On May 9, 1977, Lipscomb served upon various officers and directors of PFA a notice which recited that—

> ". . . by reason of the default in payments under the promissory notes held by the undersigned, that the undersigned do hereby elect to accelerate and make all payments due under said notes immediately due and payable and do hereby demand payment in full of the maker Progressive Farmers Association of each and every such note".

This notice was accompanied by a second notice which was entitled "Notice of Foreclosure" and which recited in part—

> "that by reason of default in the terms of said security agreements and promissory notes that the undersigned have and will take possession of all collateral for the payment of said notes as granted them by said security agreements . . ."

The evidence presented in the 1977 hearings was directed toward debtor's failure to pay the note installments when due. The Bankruptcy Court found that timely payment had been waived by the conduct of the parties. The District Court affirmed this finding, holding that it was supported by substantial evidence and that it was not clearly erroneous.

Although the notice of foreclosure, served simultaneously with the notice on May 9, 1977, is ambiguous in setting out grounds for declaration of default, the evidence presented in the 1977 hearings does not suggest a default other than non-payment. This Court finds that except for the alleged untimely payments there are no allegations of defaults as to the first category of requirements and the evidence of that default, as has been noted, is insufficient to support an order of relief.

The second of these is the existence of materially false warranties or representations which induced the secured party to extend credit. There is no evidence of any such warranties or representations made to the secured party. The third category is

> ". . . the danger of misuse or confiscation of the Collateral in the opinion of Secured Party . . . or the making of any levy, seizure or attachment thereof or thereon or the issuance of an injunction with respect to the use or sale thereof".

At the time Lipscomb served notice of default, the SEC was investigating PFA as to the sale of "Estate Builder" interests. None of the Lipscomb properties or businesses were involved in such sales although a person purchasing an Estate Builder interest was entitled to certain privileges when purchasing Aggieville merchan-

dise. From what little evidence there is, this Court concludes, without making a definitive finding, that an Estate Builder was a form of annuity. The SEC asserted that it was an unregistered security.

Over the several days preceding the delivery of Lipscomb's notice, the PFA officers, directors and attorneys met constantly to deal with the SEC investigation and to determine a course of conduct. There was some conversation to the effect that the SEC was going to shut down PFA and that Aggieville was going to be closed as part of that effort. Lipscomb himself was involved only peripherally in these conversations.

The PFA meetings appeared to have two purposes in early May of 1977. One was to minimize the impact and reach of the SEC investigation. The other was to consider some form of reorganization using Aggieville and other non-Estate Builder assets as the foundation. Referring to those meetings, Max Lilley, a Springfield attorney, who was consulted about the problem testified that -

> ". . . we were making our investigation to see whether or not it was feasible to try to reorganize them under a chapter ten . . .
>
> "We had to see if we had a feasible plan to stay in business. They wanted to stay in business. They were operating at that time . . .". Transcript November 9, 1983, Vol. 2, p.7.
>
> ". . . it was suggested . . . that perhaps Caleb Lipscomb could be used in a reorganization. I remember we did talk about that . . . Aggieville was a viable going business and with that nucleus we might be able

to effect a reorganization . . .". Transcript November 9, 1983, Vol. 2, p.17.

Lilley testified that PFA had retained an attorney knowledgeable in SEC matters to represent the company. Lilley was retained to assist in any reorganization effort. The SEC complaint was directed toward the stopping of the selling of securities but there was some thought that the effect of an injunction would be to close all the PFA operations including Aggieville. However, on the 9th day of May 1977 the SEC complaint had not been filed.

Lilley testified that during his involvement, prior to the filing of the bankruptcy, neither Lipscomb nor his attorneys complained to him or to anyone in his presence about the sufficiency of his collateral. Transcript November 9, 1983, Vol. 2, pp. 43-49. Lipscomb, on the other hand, testified that he was concerned for many months about his security.

"Q. Mr. Lipscomb, during 1976, did anything occur as regards to the PFA operations which made you feel insecure?

"A. Yes.

. . .

"A. Along in the late spring of '76, the . . . cocktail circuit began to quiz me about the rumors that were going on about the PFA operations . . . I was advised that the organization . . . was delinquent on their bills for merchandise and services that they had purchased". Transcript November 22, 1982, p.26.

Apparently Lipscomb took no action about any insecure feelings he had in the spring of 1976. In early

1977 he testified that his concerns reappeared when he obtained a copy of the audit which contained a letter from the accountant reserving his opinion and which raised questions about the values of certain properties.

In January of 1977 Lipscomb became involved actively in the management of Aggieville. He took over the checking account "[b]ecause there were monies that were coming out of the Aggieville account to operations other than Aggieville and that Aggieville payables were not being met and I was getting complaints from the suppliers". Transcript November 22, 1982, p.45.

When Lipscomb took over the Aggieville operation in January of 1977, the business had credit problems and was suffering to some degree from adverse publicity about PFA. Transcript November 22, 1982, pp.59-91, passim. But Lipscomb was able to stabilize the credit situation. Transcript November 22, 1982, pp. 155-168, passim. Lipscomb also caught up the note payments due the Lipscomb entities, except for the twine note, through April of 1977. Transcript November 22, 1982, pp. 122-127.

In July of 1977, when these events were more recent in everyone's memory, and testimony was not colored by knowledge of the issue identified on remand, Lipscomb testified that there was plenty of money to meet the bills.

"Q. Were they [PFA and Aggieville] operating, in what manner were they operating contrary to your wishes or suggestions?

"A. They weren't paying the bills on time.

"Q. Well, was that because they didn't have the money or weren't making the money?

"A. No, it was because of a poor selection of priorities, because when I took over in January, we got all our payables up in fine shape".

Transcript July 19, 1977, p.47.

Thus in early May of 1977, before the SEC investigation came to a head, the Aggieville operation was in good financial condition. There is little question that there was some possibility that, as a result of the SEC investigation, Aggieville could be closed. But it is also clear and the Court so finds that the notice does not declare, as a basis for acceleration of the notes that Lipscomb deems himself to be insecure.

Generally a declaration of default which expresses the state of mind of the secured party must be made in good faith. *Feller v. McKillip,* 81 SW 641 (Mo. App. 1904).

> "A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised".

Section 400.1-208, R.S. Mo. 1969. See also 69 Am.Jur.2d, Secured Transactions §323 and Annotation at 125 ALR 313 and 61 ALR3d 244.

In *Miller v. Jones,* 635 SW2d 360 (Mo. App. 1982) the court held that if a holder of a note decides to exercise an acceleration clause "he is required to perform some af-

firmative act evidencing his intention to take advantage of the accelerating provision . . .". 635 SW2d at 362. See also *Don Anderson Enterprises, Inc., v. Entertainment Enterprises, Inc.*, 589 SW2d 70 (Mo. App. 1979) where the court also enunciated an affirmative action requirement but went on to distinguish acceleration for default of payments as opposed to acceleration where the holder does so "at will" or where he believes himself to be insecure. 589 SW2d at 73. The clear suggestion is that the holder has to set out the grounds upon which he relies to justify an acceleration.

The notice delivered on May 9, 1977 and the testimony offered at the 1977 hearing demonstrates clearly that Lipscomb's attempt to accelerate was based upon an alleged default in payment and upon no other ground. While language in the "Notice of Foreclosure" is broader it can be fairly read as simply detailing the remedies Lipscomb intended to utilize because of the default in payment. The reference to other documents does not enlarge the grounds for declaring a default or accelerating because nonpayment as a ground is set out in those documents.

The evidence in subsequent hearings shows that Lipscomb was concerned about the state of his collateral. Guided by the order on remand he attempted to give that concern more prominence as part of the rationale for acceleration. But the evidence belies that emphasis.

On several occasions prior to May of 1977, Lipscomb says he was troubled by the performance of PFA and Aggieville. But he did not declare an acceleration or default on any of these occasions. Rather, he acted in a proprietary fashion by resuming active control of Aggieville in January of 1977 and remaining in control until early in May when he was dispossessed for a few days.

Not only did he take control of the business, he also took control of the bank accounts and check book, paying the Aggieville bills, dealing with Aggieville creditors and customers and denying PFA any access to Aggieville funds. Transcript November 22, 1982, p. 52. He resumed control on May 10, 1977 and continued when the receiver was appointed after the bankruptcy was filed.

After the 1977 hearing the bankruptcy court denied relief on the ground that Lipscomb had waived timely payments. This finding was sustained on appeal. It must also be noted that from January until May of 1977 Lipscomb was making the note payments to himself and the related note holders from Aggieville funds. Reliance, therefore, upon lateness of payments as a basis for a declaration of default would certainly be suspect as lacking good faith.

In addition to the testimony there is another ground which weighs against the Court finding any validity to the argument that Lipscomb's feelings of insecurity supported his May 9, 1977 notices. As a result of the 1977 hearing, the bankruptcy court found, and this finding was not disturbed on appeal, that reclamation should be denied because Lipscomb had possession of the property sought to be reclaimed. The evidence conclusively shows that Lipscomb had never conveyed any of the property he was obligated to deed to PFA. About the only thing that could be threatened by a blanket injunction obtained by the SEC would have been the Aggieville business which the PFA officers and attorneys were striving to keep from being involved. It is also clear that the SEC had little interest in closing Aggieville as contrasted to its interest in stopping sales of "Estate Builders". Certainly on May 9, 1977, Lipscomb had little reason to believe that his

collateral was in much danger for he had ownership of most of it and was, to use the words of counsel, secured by belt and suspenders, as to the rest.

Reference to Section 400.9-501(1) of the Uniform Commercial Code, R.S. Mo. 1969, does not enhance Lipscomb's position here. That section simply provides that upon default "a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement". The limitations contained in subsection (3) relate to the secured party's rights to deal with the collateral but do not reach the question of the secured party's obligations to perform further. The remedies set out in Section 400.9-501 include reducing a claim to judgment, foreclosure and resort to judicial enforcement. The deeds of trust contain the usual foreclosure powers. The security agreements do not contain language excusing the secured party from further performance.

The Court finds, therefore, no grounds for the declaration of forfeiture in the language as contained in the various agreements as discussed herein to this point. The evidence shows that Lipscomb relied upon nonpayment. The evidence of conduct does not support another conclusion. This is not to say, however, that Lipscomb would not have been entitled to declare a default eventually, under the circumstances of this matter, but such a declaration would only permit him to begin to seek repossession through further proceedings utilizing the remedies made available by law or in the instruments. This declaration when made would not excuse performance.

V

The fourth series of events described as defaults include "dissolution, . . . insolvency, business failure, appointment of a receiver . . . or the commencement of any proceeding under any bankruptcy or insolvency laws by . . . Debtor . . ." These events are closely related to the issue raised by the District Court concerning insolvency as a defense to further performance and so the evidence in this regard will be examined as a whole.

Some aspects of this issue, however, can be dismissed at the outset. On May 9, 1977, the critical date, there was no commencement of any proceeding under any bankruptcy or insolvency laws. That action did not take place until May 13, 1977. Similarly there was no appointment of a receiver or a dissolution. A declaration of default, therefore, could not be based upon those specific grounds.

There remains, however, the possibility of a declaration of default based upon "insolvency [or] business failure". But the remedies available upon such a declaration, as a matter of agreement or under the Uniform Commercial Code, do not include the excusing of future performance. Such an obligation is only excused under certain narrow circumstances described by court decisions in Missouri. To determine whether a default existed or whether future performance is excused, this Court must determine whether there was business failure or insolvency as a matter of Missouri law.

> "Insolvency, whether of a corporation or a natural person, means inability to pay debts as they become due in the ordinary course of business". *Bushman v. Bushman*, 279 SW 122, 126 (Mo. 1925).

See also *Adams v. Richardson*, 337 SW2d 911 (Mo. 1960).

In *Bushman*, supra, the issue was whether a receiver should be appointed. The court did not analyze the defendant's daily expenses but looked to the whole asset picture. The court noted that defendant had a substantial equity in real estate and in her mother's estate. The court found that defendant's assets far exceeded her liabilities and that she was solvent. The court did not discuss whether defendant was paying her bills. Similarly in *Adams*, supra, the court noted that defendant was in default on his child support payments and that the transfer stripped defendant "of his ability to pay his debts". 337 SW2d at 917. Again the court did not discuss the paying of bills.

In *Woodbury v. Pickering Lumber Co.*, 10 F.Supp. 761 (DC WD Mo. 1933) the court reviewed the establishment of a wholly owned subsidiary in the context of an allegation of fraudulent transfer. The court initially found "that notwithstanding the large excess of assets over liabilities the company was unable to meet its current obligations without a rehabilitation of its credit stature". 10 F.Supp. at 763. The court noted, however, that current bills payable could have been paid out of existing assets, and "that practically the sole object of the subsidiary corporation was to arrange for the satisfaction in some way of the short-time loans made by the banks". 10 F.Supp. at 764. The court noted that creation of the subsidiary worsened the condition of the parent corporation because of the diminution of assets and improved the status of a few creditors. The court found that the corporation was commercially insolvent even though it could pay its current bills and the creation of the subsidiary was a fraudulent transaction.

The case was appealed. *Commerce Trust v. Woodbury,* 77 F2d 478 (8th Cir. 1935). The court noted that the corporation was not insolvent as a matter of bankruptcy law, 77 F2d at 480, but that it had credit problems with its banks. Many of its short term debts were due or were shortly to come due and it had accounts payable, some past due, of $440,000. The court went on to discuss the question of insolvency.

> "One is insolvent for the purposes of a creditor's bill . . . to appoint a receiver . . . when he is unable to pay his obligations as they mature; likewise this is the test which warrants the vendor in refusing to deliver goods on a continuing contract, and in exercising the right of stoppage in transitu". 77 F2d at 488.

The court went on to point out that the test of insolvency as it applied to a fraudulent transfer was not the inability to pay debts as they came due but rather the test expressed "in the Bankruptcy Act of 1898 [which is] whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts". 77 F2d at 489. The court reversed the finding of insolvency but agreed that the subsidiary was not a separate entity.

It is clear here, because this is not an example of a fraudulent transfer, that the test is whether the debtor could pay its obligations as they became due in the ordinary course of business. A balance sheet test is not the proper standard. The party seeking reclamation has the burden of proof on the question of insolvency.

The accountant who prepared portions of debtor's annual report, issued March 31, 1977, was called as a witness. The balance sheet showed stockholder equity

while the statement of operations showed a loss of $1,325,210 and a decrease in working capital of $347,423. Lipscomb Ex. 27. In that report the accountant issued a qualified letter stating that as to -

> "the issuance of certain long-term unsecured debt, the Company has recorded a portion of the proceeds as revenues and also deferred a portion of the issuance cost. This treatment, in our opinion, does not comply with generally accepted accounting principles . . ."

The letter went on to state that because of this treatment, "the financial statements referred to above do not present fairly the financial position of Progressive Farmers Association at May 31, 1976 . . ."

In his testimony the accountant testified that the dispute was over recognition of certain future obligations. Transcript December 3, 1982, pp. 10-12. He also testified that a qualified letter was an unusual event because the accountant would usually be fired before the audit was completed where such a basic disagreement as to treatment existed. Transcript December 3, 1982, p.33. This particular testimony explaining why qualified opinion letters are rare came in as part of an offer of proof which was rejected but the specific statement is used here as illustrative and not probative in any issue. It merely sets the tone of what was happening in the last year of PFA's existence.

The accountant was of the professional opinion that PFA was solvent by a balance sheet test on May 31, 1976, the formal date of the audit, because of the values contained in the various reports. Transcript December 3, 1982, p. 65. His personal opinion, because of misgivings as to some valuations, was different. Transcript Decem-

ber 3, 1982, p. 66. He testified that there would have been no change through December 3, 1976 to debtor's financial condition. Transcript December 3, 1976, p. 68. He also testified that if insolvency was defined as "the inability to pay debts as they come due in the ordinary course of business" then PFA was solvent on May 31, 1976, through the summer and probably into December of 1976. Transcript December 3, 1982, pp. 68-69. The accountant further stated that he had no opinion as to debtor's ability to pay its debts in May of 1977. Transcript December 3, 1982, p. 79.

David Gamble worked for debtor with responsibility for the accounting records. He was employed from January of 1976 through the early part of May of 1977 and quit a few days before the bankruptcy was filed. He was called as a witness for Lipscomb. He testified that he consolidated the ledgers for the various operations, commenting that Aggieville kept its own general ledger. Transcript December 2, 1982, p.8.

On May 6, 1977, Gamble's last day of employment, he was of the opinion that PFA had about $30,000 in the various bank accounts which it maintained, excluding the Aggieville account. Transcript December 2, 1982, p.18. He testified that the various entities paid their own bills from their own accounts. Transcript December 2, 1982, p.19. He admitted that on occasion, although rarely, checks were held because of cash flow problems. Transcript December 2, 1982, p.21, 23.

Gamble testified that on May 6, 1977, the tire centers were closed and that the payables at the two locations were higher than their cash available. Transcript December 2, 1982, p.24. But there is no evidence that all

those payables were due on May 6, 1977. Gamble also testified that as of February 28, 1977, based upon profit and loss statements provided by Aggieville, the Aggieville division was not profitable. The loss was $511,000. But that loss included an intra-company payable, owing to PFA of $637,861.24, which clearly illustrates that Aggieville, setting aside the intra-company payable because it was never paid, Transcript December 2, 1982, pp.35-36, had a positive cash flow during this period in 1977. Transcript December 2, 1982, pp.28-33, 37-39. Gamble testified that the condition would not have changed much from February 28, 1977 through May 6, 1977. Transcript December 2, 1982, pp.29-30. Debtor used its funds to pay some Aggieville expenses, such as payroll. Transcript December 2, 1982, p.33.

When Gamble left PFA on May 6, 1977, there were bills yet to be paid. He said they might not have been paid because of cash flow considerations. He recalled no particular obligation except for payroll taxes of some $18,000. Transcript December 2, 1982, pp.59-61. His best recollection was that the various notes were all current when he left. Gamble went on to testify that the taxes could have been paid on May 6, 1977 because there was money available. He was unable to say conclusively why they were not paid. Transcript November 10, 1983, pp. 6, 34-35. Although Gamble testified that he was of the opinion that debtor was insolvent on May 6, 1977, it is apparent that he is thinking of insolvency in the general sense and not in terms of the debtor being able to pay its bills as they come due.

> ". . . I based my opinion on two major reasons. The FMA organization going bankrupt which . . . at that time . . . was a considerable asset on the PFA books,

> one of the major assets, as a matter of fact . . . plus Wes Chase telling me . . . [h]e was of the opinion that things were going to get bad. So, considering both things, I think on May the 6th . . . that PFA was insolvent. Other than that, I don't really know what you're asking me". Transcript November 10, 1983, p.21.

It is apparent that the witness is describing balance sheet insolvency here. He did testify that all the accounts payable were not current on May 6, 1977, Transcript November 10, 1983, p.21, but the only specific account he referred to as unpaid on that day was the withholding tax obligation. He denied basing his opinion of insolvency on the status of the accounts payable. Transcript November 10, 1983, p.22.

Gamble admitted that he was not certain on May 6, 1977, whether the cash on hand would have paid all the payables on that day. He was also not aware of what cash was on hand in the Aggieville account or how that would impact debtor's cash flow. Transcript November 10, 1983, p. 36. Lipscomb, however, testified that Aggieville was overdrawn around that particular time. Transcript Nevember 22, 1982, p.114-115. Gamble also testified, despite his opinion as to debtor's financial condition on May 6, 1977, that it would not have had to close on that day and he could not predict what day in the future it might close. Transcript November 10, 1983, p.40. He also testified with some reservation because he could no longer remember the exact figures that PFA probably could have paid those accounts due on May 6 and 9, 1977. Transcript November 10, 1983, pp.49-51, 77.

Gamble went on to state that he had never calculated all of the accounts due on May 9, 1977, and all of the cash

available to pay them. Transcript November 10, 1977, p.54. The general thrust of Gamble's testimony was that debtor had cash flow problems in 1977 but that it was able to keep operating.

Two bank officers testified that on or about May 9, 1977, debtor had about $34,500 in the two banks, Empire and Centerre, and there were no insufficient funds checks shown on the record. Beverly Campbell worked for Gamble from the latter part of 1976 until the debtor stopped doing business. He told her what checks to write. Transcript November 9, 1983, III p.7. She recalls no complaints in May about unpaid bills. Transcript November 9, 1983, III pp.9-10. She testified that there was not enough money in May to pay expenses, Transcript November 9, 1983, III p.14, but admitted, on cross-examination that she managed only one bank account and was not familiar with the whole financial picture of debtor. Transcript November 9, 1983, III pp.16-17. She also testified that the payables showed constant carryover but that there were no Aggieville payables on her books. Transcript November 9, 1983, III p.23.

Wes Chase, an officer of debtor, also testified as to the financial status of debtor in 1977. He and Gamble would decide what accounts to pay and would prioritize the bills. Transcript November 9, 1983 I, pp.7-8. He admitted there were occasions when funds were insufficient and that a phone bill and some taxes were overdue. Transcript November 9, 1983 I, pp.8-10. He testified that debtor owed more than could be paid on May 9, 1977 and that debtor was not current on notes to O'Byrne Electric and Larry Robinson (a single obligation) and to Mercantile Bank. Transcript November 9, 1983 I, pp. 16-17. The Robinson note was extended in December of 1976. There

is also no evidence that a demand had been made on whatever obligation was due to Mercantile Bank of the amount due the Bank on May 9, 1977.

Percival kept the general ledger for Aggieville in 1977 and before. After Lipscomb took over the business in January of 1977, Percival began issuing checks for Aggieville payables. Transcript December 2, 1982, p.42. He and Lipscomb decided when payments were to be made, Transcript December 2, 1982, p. 108 and which customers would get credit. Transcript December 2, 1982, p. 91. He also testified that all the Aggieville trade payables were current on May 9 and May 13, 1977. Transcript December 2, 1982, p.109.

Lipscomb testified that a precipitating cause for his declaration of default was debtor's refusal to pay him anything on the twine note, executed November 10, 1976 and secured by the inventory which was purchased. Lipscomb testified that the twine was purchased by his companies before their sale to debtor and he just assigned the contract. The note came due on February 25, 1977 and Lipscomb asked for payment.

"Q. When did you request payment on that note?

"A. February 25, 1977 or/and the day following that date.

"Q. And do you remember who you talked to about that note?

"A. Mr. Gamble initially.

. . .

"Q. What did you ask him?

"A. I asked him for payment of it. It was a demand note and asked for payment of the note at that time.

"Q. What was his response?

"A. His reponse was that he did not have the money to pay it.

. . .

"Q. Who else did you talk with concerning payment of this note?

"A. I talked to the board . . . and to Mr. Wes Chase.

. . .

"Q. What was his response?

"A. He did not have the money to pay it.

"Q. When did that response occur?

"A. . . . Sometime after the 25th of February 1977.

"Q. . . . are we talking about as late as May of '77?

"A. It was an ongoing request. I was with them constantly to get the payment on the note . . ."

Transcript November 22, 1982, pp.50-51.

Lipscomb testified that he received no payment on the note. He also testified that he cannot recall if he extended the note after February 25, 1977.

"Q. . . . as a result of these conversations . . . did you extend the time for payment of the twine note?

"A. I can answer it best by saying I did not make a written demand and take foreclosure procedures prior to May 9th . . ."

Transcript November 22, 1982, p. 235.

As drawn the note is not a demand note until after it matures on February 25, 1977. See Lipscomb Ex.7. The

note also contemplates extension beyond that date. "This note to bear interest only if not paid at maturity . . . the time may be extended without notice thereof. If not paid when due, the undersigned agree to pay all costs of collection . . .". Lipscomb's testimony as to the status of this note after February 25, 1977 is not credible. He could not remember if the term was extended yet he took no action to collect. In other instances when PFA notes were due, Lipscomb paid them out of Aggieville funds. This note was secured, apparently adequately. The Court finds that Lipscomb has failed to prove that the twine note was due in the ordinary course of business on or before May 9, 1977.

Debtor, together with PFA Farmers Market Association, was a maker of notes to Associated Wholesale Grocers, Inc., hereinafter AG. The face amount of the notes exceeded two million dollars and the notes were secured by real estate, inventory, furniture and fixtures owned by the Market. In February and April of 1977, AG wrote debtor and the Market demanding that the levels of collateral be maintained and threatened to accelerate the notes if the demand was not met. On April 16, 1977, AG declared the notes to be in default. The notes provided for cure of default within 72 hours of notice of default. There was no cure and AG declared the debts due and owing by letter dated April 21, 1977. The amount alleged to be due was $884,732.13. Baska deposition Ex.5.

At the time the April 21, 1977 letter was mailed, Farmers Market had filed a Chapter XI bankruptcy case. Baska deposition January 21, 1983, p.60. There had been payments on the notes and on the open account between the dates of the first and last letters, Baska deposition

January 21, 1983, p.64, but no payments after April 15, 1977. The evidence shows that the notes were collateralized and there was a guarantee. Baska deposition January 21, 1983, pp.61-63 and see security agreement dated November 3, 1975 and amendment dated June 22, 1976. The evidence shows that no one could determine the precise amount due on the notes as of May 9, 1977. It clearly would not have been the amount of the demand because, at the very least, of the offset of the value of the collateral which would be foreclosed. Baska deposition January 21, 1983, p.62.

Baska testified that there had been no response to his various demand letters. Baska deposition January 21, 1983, pp.38-39. In view of the SEC investigation and the bankruptcy filing of Farmers Market, the Court finds no significance to the fact that there was no vigorous denial of liability or amount due. There were ongoing discussions of the problems. The only point of dispute would be the amount due and that was not likely to be resolved for a substantial period of time. The Court does not find that debtor's failure to contest the contents of the various AG letters of April 1977 is an admission as to the precise amount of liability.

In *Commerce Trust Co. v. Woodbury*, supra, the question ultimately resolved by the court was whether a receiver could take charge of the business activities of a subsidiary corporation where only the parent corporation was the subject of the action. The court found debtor to be solvent as a matter of balance sheet analysis. 77 F2d at 480. But the court went on to note that there were substantial matured obligations on the long term debt, the case having been filed in May of 1931 and the obligations maturing in 1930 and "[i]n addition to the

above there were accounts payable, many of which were past due, approximately $440,000." 77 F2d at 481. The court concluded that the parent corporation was not insolvent, as the trial court found, because there were sufficient assets to pay the accounts payable, 77 F2d at 490, and because a judgment creditor would have been able to satisfy its execution. The court makes a distinction between accounts payable and long term debt obligation. See also *Carson v. Long-Bell Lumber Corporation,* 73 F2d 397 (8th Cir. 1934).

Some comparison can be made with cases arising under bankruptcy laws dealing with the initiation of involuntary cases where the standard the evidence must meet is a finding that the alleged debtor is not paying debts as they come due. Section 303 of the Code, Title 11, U.S.C. Historically, as embodied in 1984 amendments to Section 303(b)(1), a debt is excluded from consideration if there is a bona fide dispute as to liability. *In re North County Chrysler Plymouth, Inc.*, 13 BR 393, 7 BCD 1409, 4 CBC2d 1533 (Bkrtcy. W.D. Mo. 1981); *Harris v. Capehart-Farnsworth Corporation*, 225 F2d 268 (8th Cir. 1955).

Equally important, the question of whether a debtor is not paying his debts as they generally come due is a matter that must be determined in the context of a particular entity and not by any broad standard. *In re Galanis*, 20 BR 590 (Bkrtcy. Conn. 1982); *In re R.N. Salem Corp.*, 29 BR 424 (DC SD Ohio 1983); *In re Einhorn*, 29 BR 966 (Bkrtcy. ED NY 1983). Missouri courts regularly look to cases in bankruptcy for the determination of such standards. *Commerce Trust Co. v. Woodbury* supra, 77 F2d at 489.

> "[T]he court below believes that generally not paying debts includes regularly missing a significant number of payments to creditors or regularly missing payments which are significant in amount in relation to the size of the debtor's operation. Where the debtor has few creditors the number which will be significant will be fewer than where the debtor has a large number of creditors. Also, the amount of the debts not being paid is important. If the amounts of missed payments are not substantial in comparison to the magnitude of the debtor's operation, involuntary relief would be improper". *In re All Media Properties, Inc.*, 5 BR 126, 143 (Bkrptcy SD Tex. 1980), quoted with approval in *In re Salem Corp.*, supra, at 432.

Courts have also held "that evidence which indicates amounts owed by a debtor but which does not indicate when the amounts are actually payable, is insufficient to prove the debtor is not meeting its debts". *In re Einhorn*, supra, 29 BR at 969. See also *Matter of B.D. Intern. Discount Corp.*, 15 BR 755 (Bkrtcy. SD NY 1981).

What the evidence shows here is that in 1977 and perhaps before, debtor had cash flow problems which caused it to pay its ongoing accounts in an erratic fashion. That was certainly the situation in late April and early May of 1977. That evidence compels the Court then to look more closely at allegations and evidence of nonpayment in order to determine whether there exists general inability or merely continuation of previous practices.

There is a great deal of testimony that debtor owed bills on May 9, 1977, which it could not pay. But that testimony is general. It does not enable the Court to identify those bills which had been booked and were due

as opposed to those which merely had been received and were not yet due.

The temptation here is to analyze debtor's position as if the test were balance sheet insolvency. The evidence suggesting that debtor was in dire financial condition on May 9, 1977 is plentiful. But balance sheet insolvency is not the test and the Court must look hard at the evidence to determine that the proper test be applied and satisfied.

On May 9, 1977, debtor was not active in its various businesses. The tire center stores had been closed in the prior few days. Estate Builder sales apparently were continuing but generated few costs. Aggieville was operating but was current on its payables. Debtor had few employees. So far as the evidence shows its major obligations were long term debts. Its payables for services, utilities, taxes and salaries were nominal. In addition to cash in banks, debtor had Estate Builder funds of an unknown amount on hand. Lipscomb argues those funds were not available to pay bills. What the evidence shows is, that because of the SEC investigation, debtor chose not to use those funds. They were available, although the amount is not in evidence, it is easily ascertainable, and must be considered in determining whether debtor had the ability to pay its debts as they came due. In addition, it had about a quarter of a million dollars in accounts receivable at Aggieville, which, according to Lipscomb, were 90% collectible, Transcript November 22, 1982 pp. 176-182, against which debtor owed Lipscomb only about $101,000.

Because Lipscomb ran Aggieville for debtor in 1977 through May 6, it is easy to view it as separate from debtor. It was not and it is important to consider Aggieville assets as available to debtor to make payments.

Therefore on May 9, 1977 debtor had quick assets in excess of cash on hand out of which it could have paid accounts due.

The evidence shows two bills, for printing and telephone, past due for small amounts. It shows some taxes past due. The evidence shows Aggieville current on its trade payables. The Court has previously concluded that the assertion the twine note was past due is not credible. On long term obligations owed the Lipscomb interests, the court on appeal has held that the creditors had waived timely payments. Those installments then were not necessarily due on May 9, 1977. The Court further finds that debtor had assets available to pay the installments on the AG notes that were due through May 9, 1977. These amounts were rather nominal. See the promissory note attached as exhibit to the Baska deposition. In addition, this Court finds that those long term debts and the notes owed AG were not the type of obligation that courts would look to in trying to determine if a debtor were paying its bills as they came due in the ordinary course of business. Courts clearly distinguish between trade payables and long term debt when considering the solvency of a debtor. See, for example, *Commerce Bank Co. v. Woodbury*, supra, and *In re R.N. Salem Corp.*, supra. The rationale for this is clear. Reorganization often involves the restructuring of long term debt, but an inability to pay both long term debt and trade payables tends to be fatal. The Court does not suggest that an inability to pay installments on long term debt is to be ignored but only that such evidence must be held in perspective.

The evidence here does not show that debtor was not paying its bills as they came due in the ordinary

course of its business. What definitive evidence there is shows that debtor in May of 1977 was continuing its erratic pattern of paying bills but that it had sufficient assets, including cash, to meet the ordinary business obligations which the evidence shows to have been due. The Court finds that debtor was solvent as a matter of Missouri law on May 9, 1977.

In accordance then with the directions of the District Court this Court holds that Lipscomb was not excused from future performance on May 9, 1977 and the trustee is entitled to rescind. This Court further holds, consistent with that part of Judge Jones' opinion not set aside on appeal, that the trustee is entitled to recover the sum of $458,825.10 from the various plaintiffs, jointly and severally. *Cannon v. Bingman,* 383 SW2d 169 (Mo. App. 1964).

SO ORDERED this 12th day of June, 1985.

/s/ Joel Pelofsky
Bankruptcy Judge

APPENDIX

The evidence shows, and Judge Jones so found that Lipscomb and related entities never conveyed the real estate which they agreed to sell to debtor. He therefore denied reclamation. That finding and holding was not disturbed on appeal.

Despite Lipscomb's failure to convey, debtor made the down payments and executed the various notes called for in the sales agreements. Debtor also began to pay the installments required by those notes and was current through April of 1977. Execution of the notes and payments thereon evidenced reliance on Lipscomb's representations that he could deliver good title on debtor's part for it had no legal obligation to execute the notes until the property was conveyed. The various agreements provided that the promissory notes were to be "dated as of the date of transfer of the real property provided for herein . . .". Since the property was never transferred, the notes could never be dated and it is reasonable to assume therefore, although the Court makes no finding because the issue is not before it, that payments on the real property were never due.

Here Lipscomb breached his obligation to deliver title but appears here to insist that debtor's subsequent failure to perform justifies his "in limine" failure to perform and excuses further performance. That position is not the law in Missouri. "It is elementary that a party to a contract cannot claim its benefit where he is the first to violate it". *Boten v. Brecklein*, 452 SW2d 86, 92 (Mo. 1970); *Burns v. Beeny*, 427 SW2d 772 (Mo. App. 1968). To support a recovery for breach, the complaining party must show his own performance or his ability to perform.

Navato v. Sletten, 560 F2d 340 (8th Cir. 1977) following Missouri law.

This is not to say that ultimately Lipscomb could not foreclose his various security interests. That rests upon questions of default, first, and the trustee's evaluation of whether the property was of value to the estate, second. The question here, however, is whether Lipscomb can sell his property, keep it and still get paid for it as if he had performed.

> "It is true that the prospective inability to perform which arises upon the insolvency of one party to a contract does not necessarily excuse the other party from performance . . . [citations omitted] . . . but it may justify the solvent party in requiring security as a condition to further performance". *First State Bank v. Reorganized Sch. Dist. R-3, Bunker*, 495 SW2d 471, 479 (Mo.App. 1973).
>
> This is a well settled rule of law in Missouri.
>
> "The law is that . . . it is necessary for the party intending to sue for enforcement of the contract . . . [to] . . . make a tender of performance . . .
>
> "The fact that the other party, by whom money was to be paid, is insolvent . . . will not on this ground excuse a tender to him . . . *Cornett v. Best*, 132 SW 35, 36 (Mo.App. 1910).

See also *H. Muehlstein & Co. v. Hickman*, 26 F2d 40 (8th Cir. 1928) where the court, ruling a case arising in Missouri, held that "[i]nsolvency does not operate to relieve from breach of contract" 26 F2d at 44, and therefore the party seeking damages must show either performance or an ability to perform.

The general rule of law has been codified, although not for land sales (see 400.2-102 and 400.2-105(1), R.S. Mo. 1969 provisions which exclude real estate transactions from coverage under the UCC) in Section 400.2-702(1), R.S. Mo. 1969, which provides that:

> "Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this article".

Here, of course, this was not a matter of a continuous course of dealing. Lipscomb had an obligation to deliver title at the time the agreements were executed and certainly at the time debtor delivered the cash down payments and the notes. He was in breach thereafter through May 9, 1977. It does not appear that he could at any point during that period of time perform in accordance with the agreements. See 4 Corbin on Contracts, §978 at 925.

The leading case in Missouri construing rights arising under Section 400.2-702 is, ironically, *Matter of PFA Farmers Market Ass'n.*, 583 F2d 992 (8th Cir. 1978). That case, however, deals with the rights of the reclaiming creditor, §400.2-702(2), against the trustee and not the question of whether and under what circumstances a party to a contract may refuse to perform in view of the other party's apparent insolvency. Compare *Indussa Corp. v. Reliable Stainless Steel Supply Co.*, 369 F.Supp. 976 (DC ED Pa. 1974). The clear thrust of cases as *Indussa Corp.* seems to be that a party to a contract requiring continuing performance or prior to any performance may refuse where the other party is insolvent. Here, however, the allegedly insolvent party had made substantial performance

while Lipscomb, seller, had not tendered and was unable to tender throughout the period of payments. The facts do not appear to fit within the general run of mercantile cases.

The evidence from the July 19, 1977, hearing shows that Lipscomb recovered, or attempted to recover, in May of 1977, property worth more than he sold.

"Q. . . . Are you saying that the real estate that you have today, the three locations is worth more today in a normal way, . . . absent your bankruptcy . . . than it was seventeen months ago, is that right?

"A. I believe the real estate is worth more than it was seventeen months ago, under these conditions.

Transcript, July 19, 1977, p.53.

"Q. . . . Now wouldn't you say . . . in fairness that what you got on May 9th was as good an inventory as you sold on December 5th, 1975, and of $100,000 plus greater value?

"A. I think it would be safe in saying that".

Transcript, July 19, 1977, p.61.

The state of the record, in light of the opinions handed down by Missouri courts, clearly suggests that Missouri courts, as a matter of first impression, would probably not excuse performance by sellers in this case.

Copy of the foregoing mailed to:

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(Filed July 15, 1985)

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

IN RE:	)
PROGRESSIVE FARMERS	)
ASSOCIATION,	)
Debtor.	)
SOUTH CENTRAL ENTERPRISES, INC.,	)
EDWIN M. LIPSCOMB FARMS, INC.,	)
and CALEB LIPSCOMB and	)
ELLEN LIPSCOMB,	)
Plaintiffs.	)
vs.	)
RICHARD FARRINGTON, Trustee,	)
Defendant.	)

JUDGMENT

This action was tried to Judge Jack Jones of this Court, and judgment in favor of the Trustee in the amount of $458,825.10 was entered by Judge Jones on September 8, 1977. On appeal, such judgment was set aside and the matter remanded for further action.

Following remand after appeal, this Court has conducted extensive hearings and issued its written Opinion filed for record June 12, 1985, after full hearing, briefing and argument. Pursuant to the Court's Memorandum Opinion and Order of June 12, 1985, it is

ORDERED, ADJUDGED and DECREED that the Trustee, Richard Farrington, have and recover from South

Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc. and Caleb Lipscomb and Ellen Lipscomb, jointly and severally, the sum of $458,825.10 with interest from September 8, 1977, as provided by law.

/s/ Joel Pelofsky
Joel Pelofsky
Bankruptcy Judge

DATE: 15 July 1985

(Filed July 16, 1985)

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Progressive Farmers Association,
Debtor.

SOUTH CENTRAL ENTERPRISES INC., EDWIN M. LIPSCOMB FARMS, INC., and CALEB LIPSCOMB and ELLEN LIPSCOMB,	)	Case No. 77-30153-B-S
Plaintiff	)	
v.	)	Adversary
RICHARD FARRINGTON, Trustee,	)	Proceeding
Defendant	)	No. .....

JUDGMENT

[x] This proceeding having come on for trial or hearing before the court, the Honorable JOEL PELOFSKY, United States Bankrutpcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

[*OR*]

☐ This proceeding having come on for trial before the court and a jury, the Honorable ....., United States Bankruptcy Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict,

[*OR*]

☐ The issues of this proceeding having been duly considered by the Honorable ....., United States Bankruptcy Judge, and a decision having been reached without trial or hearing,

IT IS ORDERED AND ADJUDGED: that the Trustee, Richard Farrington, have and recover from South Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc. and Caleb Lipscomb and Ellen Libscomb, jointly and severally, the sum of $458,825.10 with interest from September 8, 1977, as provided by law.

Copy of the above to:

Richard Farrington/Lincoln Knauer
750 N. Jefferson
Springfield, MO 65802

James McManus
500 Commerce Bank Building
Kansas City, MO 64106

David F. Sullivan
2060 E. Sunshine
Springfield, MO 65804

/s/ Diane Petro
Clerk of Bankruptcy Court
By: /s/ Pam Hagerty
Deputy Clerk

[Seal of the U.S. Bankruptcy Court]
Date of issuance: July 16, 1985

APPENDIX D

(Filed September 26, 1986)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

In Re:	)	
PROGRESSIVE FARMERS ASSOCIATION,	)	Bankruptcy No. 77-30153-B-S
Debtor,	)	
SOUTH CENTRAL ENTERPRISES, INC., et al.,	)	
Appellants,	)	
vs.	)	District Ct. No. 85-3423-CV-S-4
RICHARD FARRINGTON, TRUSTEE,	)	
Appellee.	)	

ORDER

This is an appeal from a decision of the Bankruptcy Court granting recission of a contract for the sale of an agricultural supply business of plaintiffs-appellants to the bankrupt and requiring that appellants remit to the trustee the sum of $458,825.10 with interest from September 8, 1977, as provided by law. On review, appellants contend that (1) the Bankruptcy Court erred in asserting jurisdiction over these proceedings; (2) the Bankruptcy Court erred in concluding that the only test for insolvency to be applied to the facts of this case was the "equity" test; (3) the Bankruptcy Court erred in application of the "equity" test of insolvency because the Bankruptcy Court disregarded the existence of long term debt due and owing

by the bankrupt; (4) the Bankruptcy Court erred in finding that the bankrupt was not in default of its allegations under the security agreements or contract for sale of Aggieville; and (5) the Bankruptcy Court erred in denying appellants' motion to disqualify the bankruptcy judge. This Court will affirm the Bankruptcy Court's order for the reasons set forth below.

This action arises out of appellants' sale of "Aggieville" to the Progressive Farmers Association (hereinafter "bankrupt"), a Missouri farm cooperative. Aggieville is located in the Missouri towns of Springfield, Liberal and Monett, and consists of a farm supply store, a grain elevator, fertilizer plant, and associated agricultural enterprises. At the time of the sale, Aggieville was owned in part by appellant Caleb Lipscomb and in part by the other appellants. Prior to the sale, Aggieville was operated by appellant Caleb Lipscomb.

In early December, 1975, appellants contracted to sell Aggieville to bankrupt. The contract, which was evidenced by three written agreements and promissory notes, was a "package deal." The contract required bankrupt to pay $60,000 down on the purchase price of Aggieville and the remainder—$840,000—in monthly installments of interest and principal, which were due on the first of each month, with a five day grace period. The contract further provided that appellants were to furnish bankrupt with abstracts of good and marketable title to the real estate. If bankrupt objected to the abstracts of title submitted to it by appellants, and if appellants were unable or unwilling to cure the alleged defect in the title, then the contract might be annulled at bankrupts' option.

Bankrupt operated Aggieville from early December, 1975 until early May, 1977, when appellants foreclosed

their security interest in Aggieville. During that period, appellant Caleb Lipscomb continued to act as Aggieville's general manager.

In late December, 1975 or early January, 1976, appellants tendered to bankrupt abstracts of title to the Aggieville real estate. Bankrupt verbally objected to the abstracts of title to the Liberal real estate, alleging that four of the lots in the center of the Liberal property were not entirely owned by appellants and that a building not subject to the contracts stood in part on the Liberal real estate. After bankrupt complained to appellants about the defect in the title to the Liberty property, it agreed to appellants' proposal that the defect be cured after the resolution of a lawsuit involving the Liberal real estate. In December, 1976 that lawsuit was settled and a short time thereafter bankrupt again complained about the alleged defect in the title to the Liberal property. About the same time, bankrupt began tendering its installment payments on the promissory notes. Despite the payment schedule set forth in the notes, bankrupt consistently made late payments well after the 6th of the month. Sellers never declared a default on any of the notes for late payments until May 9, 1977.

The Bankruptcy Court found that on May 9, 1977, appellants declared the bankrupt was in default for failure to make the May installment payment and upon no other ground. As a result of the bankrupt's default, appellants foreclosed their security interest in Aggieville. Bankrupt filed its petition in bankruptcy four days later. At no time did bankrupt ever tender to appellants the May, 1977 installment payment, nor did appellants ever tender to bankrupt the deeds to any of the Aggieville real estate.

On May 25, 1977, appellants filed in the Bankruptcy Court their petition for the reclamation of all the Aggieville property. The trustee in bankruptcy filed an answer and counterclaim in which he prayed for an order of the Bankruptcy Court rescinding the contract for the sale of Aggieville from appellants to bankrupt. The action was tried in July, 1977, and the Bankruptcy Court granted the trustee's prayer for recission of the contract. Appellants appealed the Bankruptcy Court's decision to this Court. By order of November 27, 1979, District Judge William R. Collinson vacated the judgment of the Bankruptcy Court and remanded the action for further findings. Specifically, this action was remanded by Judge Collinson for further findings on the issues of (1) whether the bankrupt was otherwise in default of its obligations under the security agreements on or before May 9, 1977; and (2) whether the bankrupt was actually insolvent on May 9, 1977.

On June 12, 1985, the Bankruptcy Court issued a memorandum and opinion and order, holding that the trustee was entitled to rescind the contract and that the trustee was entitled to recover the sum of $458,825.10 plus interest from the various plaintiffs, jointly and severally. The Court further found that the bankrupt was solvent on May 9, 1977. A judgment was entered on July 15, 1985. This appeal followed.

Under Bankruptcy Rule 810, a reviewing court must accept the bankruptcy judge's factual findings unless they are clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Company*, 333

U.S. 364, 395 (1948); *First National Bank of Clinton v. Julian*, 383 F.2d 329 (8th Cir. 1967). The reviewing court is not so limited when a bankruptcy judge's error is one of law consisting of giving wrong legal significance to the facts. *Solomon v. Northwestern State Bank*, 327 F.2d 720 (8th Cir. 1964). The reviewing court is free to make an independent determination of the law. *Walker v. Commercial Nat. Bank of Little Rock, Ark.*, 217 F.2d 677 (8th Cir. 1954). It is with these standards in mind that this Court proceeds with its analysis.

This case arose under the Bankruptcy Act of 1898, since it was filed in May of 1977, and the Bankruptcy Reform Act was not enacted until 1978. The first issue raised by appellants on appeal is whether the Bankruptcy Court erred in asserting jurisdiction over these proceedings. District Judge William R. Collinson has previously found that appellants voluntarily submitted to the Bankruptcy Court their petition for the reclamation of Aggieville, that the trustee filed an answer and counterclaim in which he sought recission of the contract, and that appellants responded to the trustee's counterclaim by means of a reply which addressed the merits of the trustee's contentions, but which did not raise any jurisdictional objection or defense. Judge Collinson further found that no jurisdictional objection was made by appellants at trial. Having made these findings, Judge Collinson concluded that under § 23(b) of the Bankruptcy Act, 11 U.S.C. § 46(b) (1953), appellants had consented to the summary jurisdiction of this Court and thus, the Bankruptcy court properly exercised jurisdiction over the trustee's counterclaim since it was a controversy in relation to the claim which Aggieville had voluntarily brought to the Court for relief. On remand, Judge Pelofsky

adopted the finding of this Court concerning whether the Bankruptcy Court had jurisdiction and proceeded to make the findings which this Court directed him to make.

Judge Collinson's decision on this issue of the Bankruptcy Court's jurisdiction is the law of the case, and may not now be questioned by appellants. Under the "law of the case" rule, the Bankruptcy Court was prohibited from reconsidering its own jurisdiction.

The Second Circuit in *Banco Nacionale de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), adopted this view and stated:

> Since *Ex Parte Sibbald v. United States* 37 U.S. (12 Pet.) 488, 9 L.Ed. 1167 (1938), the Supreme Court has consistently held that a lower court with jurisdiction over a case on remand under Supreme Court mandate is foreclosed from reconsidering matters decided by the Supreme Court. . . . The rule prevents the lower court from considering newly discovered evidence, . . . or reconsidering its own jurisdiction. . . . The rule has even been applied despite the claim that a later Supreme Court decision required a different result. . . . (citations omitted).

383 F.2d at 177. The Bankruptcy Court, therefore, was correct in not reconsidering its own jurisdiction and abiding by Judge Collinson's decision that appellants had consented to the juridiction of the Bankruptcy Courts.

This issue of consent jurisdiction under the 1898 Act was addressed in 2 Collier on Bankruptcy, § 23.08(5), 549-52 (14th ed. 1976). *Collier* makes the following statements with respect to consent jurisdiction:

> When an adverse claimant to property voluntarily submits the question of his claim for determination by the bankruptcy court, jurisdiction is conferred by consent, and the trustee or receiver cannot be heard to object. Nor may the claimant himself thereafter question the exercise of such jurisdiction. . . .
>
> A reclamation proceeding is a common example of the situation where the summary power of the bankruptcy court is invoked. Consequently, in such a proceeding the claimant cannot be heard to object to the court's jurisdiction to determine summarily the claimant's rights or title. Moreover, it has been held that the court may, upon a proper counterclaim, determine all the rights of the parties connected with and arising out of the transaction.

Similarly, the Eighth Circuit, in *Floro Realty and Investment Company v. Steam Electric Corporation,* 128 F.2d 338 (8th Cir. 1942), stated:

> [Plaintiff] having submitted to the court its claim for possession of the property involved, brought to the court for determination not only the questions which it deemed germane to its rights of possession, but also all questions of defense, which would be lawfully interposed, and cannot thereafter withdraw, but that court has jurisdiction thereupon to determine all controversies in relation to the claim thus submitted.

128 F.2d at 340. Thus, having voluntarily submitted their claim to the Bankruptcy Court, appellants cannot now raise the issue of said court's jurisdiction.

The next question before the Court is whether the Bankruptcy Court erred in concluding that the "equity"

test is the only test for insolvency to be applied to the facts of this case. And more importantly, whether the Bankruptcy Court erred in its application of the equity test when it disregarded the existence of long term debts due and owing by the bankrupt and found that the debtor was solvent. Judge Pelofsky, in his memorandum opinion and order, concludes that the appropriate insolvency test to be applied in this case is "whether the debtor could pay its obligations as they become due in the ordinary course of business." He further concludes that the "balance sheet" test is not the proper standard. Appellants assert that the proper standard is the federal bankruptcy law definition of insolvency or the "balance sheet" test. Appellants further contend that even if the Missouri definition is applied, the Court must employ three alternative tests and that one should not be applied to the exclusion of the others.

This Court is in agreement with appellants that the balance sheet test should have been applied in this case under both Missouri and federal law.

Missouri's statutory definition is found in R.S. Mo. § 400.1-201-(23), and provides as follows:

> A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

The Uniform Commercial Code comment which follows this provision indicates that the three tests of insolvency set forth in this statute are alternative tests and one should not be applied to the exclusion of the others. Therefore, under Missouri law, the Bankruptcy Court should have applied all three insolvency tests, including the balance sheet test.

Federal law also requires the application of the balance sheet test. The federal bankruptcy law definition of insolvency provides:

> "insolvent" means—
>
> (A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—
>
> (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
>
> (ii) property that may be exempted from property of the estate under Section 522 of this title [11 U.S.C.S. § 522].

11 U.S.C. § 101(26). This definition was adapted from Section 1(19) of the Bankruptcy Act of 1898. The only difference between 1978 Code's definition and the Bankruptcy Act's definition is that the Bankruptcy Act did not have an exempt property exclusion as found in subsection (ii) of the 1978 Code.

The federal courts have uniformly held that the Bankruptcy Code's balance sheet test is the appropriate test to apply in bankruptcy proceedings to the exclusion of the alternative equitable tests set forth in the Uniform Commercial Code. See, e.g., *In re Matter of PFA Farmers Market*, 583 F.2d 992, 993 (8th Cir. 1978); *Farmers Bank of Clinton, Missouri v. Julian*, 383 F.2d 314, 326 (8th Cir. 1967); *In re Furniture Distributors, Inc.*, 45 B.R. 38, 42-43 (Bkrtcy. Mass. 1984); *In Re National Buy Rite, Inc.*, 7 B.R. 407, 410 (Bkrtcy. Ga. 1980); *In re Fulghum Construction Company*, 7 B.R. 629 (Bkrtcy. Tenn. 1980).

Although this Court recognizes that the Bankruptcy Court's reliance on the equity test is most likely the result of a footnote definition of insolvency suggested by Judge Collinson at page 8 of his remand order, this Court notes that Judge Collinson made continuing references to the Uniform Commercial Code prior to this definition concerning whether the bankrupt was in default under the terms of the security agreement. For this reason, this Court does not feel that it is clear that Judge Collinson sought to limit the definition of insolvency in light of the overwhelming caselaw to the contrary. In any event, it was error for the Bankruptcy Court to rely solely on the equity test.

Notwithstanding the Bankruptcy Court's failure to apply the balance sheet test, this Court's decision will not turn on this error. Even if the equity test was the only applicable test, the Bankruptcy Court failed to properly apply the equity test when it failed to consider the installments due on the long-term debts of the bankrupt. Taking into consideration the installments due on certain long-term debts of the bankrupt as well as its other debts, this Court finds that there is not substantial evidence to support the Bankruptcy Court's finding that the bankrupt was solvent on May 9, 1977.

In the trustee's application for authority to continue the operation of the business of bankrupt known as "Aggieville" which was filed with the Bankruptcy Court, the trustee admits that as of May 1, 1977 the bankrupt owed appellants the sum of $429,000, $101,000 and $704,238 in connection with various loans. In addition, the trustee admits that there is no dispute that the bankrupt is in default in the payments due May 1, 1977 to appellants. Although the Bankruptcy Court decided that appellants

had waived timely payment of their long term obligations and the right to accelerate, the Bankruptcy Court failed to acknowledge the fact that payments totalling $26,833.33 were due on the five notes from the bankrupt to appellants. A $500 installment payment was due on two other notes held by appellants on May 9, 1977. Thus, as of May 9, 1977, the bankrupt had defaulted on seven notes held by appellants and approximately $27,800.00 was owing.

Appellants assert that the bankrupt also had defaulted in payment under the terms of the promissory notes owing to O'Byrne Electric and Larry Robinson. The schedules of the bankrupt indicate that the debt owing to O'Byrne Electric was $310,000 and the obligation owing to Larry and Annabelle Robinson was $842,000. The Bankruptcy Court disregarded the Robinson debt because the evidence showed the debt had been renegotiated in December 1976. With respect to the O'Byrne Electric debt, however, the Court made no specific finding other than to state that Wes Chase, officer of debtor, testified that debtor was not current on notes to O'Byrne Electric. Thus, at the very least, the evidence is that on May 9, 1977, the debtor was in default on appellants' notes and the O'Byrne Electric note which together totalled approximately $337,800.00 due and owing.

The evidence further shows that demand had been made and the bankrupt was in default along with Farmers Market Association (FMA) on two debts owing to Associated Wholesale Grocers Inc. (AG). Appellants assert that the bankrupt became obligated to AG in the sum of $515,601.01 and $884,732.13 or $1,400,333.14. With respect to these debts, the Bankruptcy Court refused to consider the total amount of the demand owing because the notes were both collateralized and guaranteed. Never-

theless, Wes Chase testified that the bankrupt did not have cash or assets to cover the AG debt as of April 16, 1977, the date AG declared default and accelerated the balance, and that the bankrupt did not later acquire any assets sufficient to cover the obligation.

The Bankruptcy Court, in concluding its opinion, further stated that "the long term debts and the notes owed AG were not the type of obligation that courts would look to in trying to determine if a debtor were paying its bills as they came due in the ordinary course of business." This finding is contrary to the approach taken by other bankruptcy courts that have applied the equity test.

Bankruptcy courts have had to apply the equity test in the context of involuntary petitions in bankruptcy. See, e.g., *In Re Tarletz*, 27 B.R. 787 (Bkrtcy. Colo. 1983); *In Re Reed*, 11 B.R. 755 (Bkrtcy. W. Va. 1981); *In re Bowers*, 16 B.R. 298 (Bkrtcy. Conn. 1981); *In re Hill*, 8 B.R. 779 (Bkrtcy. Minn. 1981). In applying the equity test, the Court must consider several factors, including the number of debts, the amount of the delinquency, the materiality of non-payment and the nature of the debtor's conduct in his financial affairs. *In re Tarletz*, 27 B.R. at 789-90. The Courts emphasize that the ratio of debts paid to those not paid is more important than a simple count of the number of unsatisfied debts. *In Re Reed*, 11 B.R. at 760. Moreover, in *Reed*, the court stated that the size of the debts should be considered, both separately and in the aggregate while bearing in mind those which were long past due and those which were newly created debt. 11 B.R. at 760. It is also necessary to examine the overall handling of the financial affairs of the debtor; that is, whether the debtor is winding up its business, selling assets in a liquidating fashion, paying only nondischargeable debts, kiting

checks or otherwise conducting its financial affairs in bad faith. *In Re Reed,* 11 B.R. at 760.

No court has suggested that it is permissible to exclude from consideration long-term debt in the application of the equity test. All the courts have considered the existence of long-term debts as an essential element in considering the debtor's solvency. In *Matter of Bowers,* 16 B.R. 298 (Bkrtcy. Conn. 1981), for example, the court expressly rejected the debtor's argument that long-term debts are "extraordinary" debts and should be treated differently than smaller "ordinary" debts. 16 B.R. at 304. For this reason, the Bankruptcy Court should not have excluded the long term debts and the AG notes from its consideration of whether the bankrupt was solvent on May 9, 1977.

The case of *In re International Teledata Corp.,* 12 B.R. 879 (Bkrtcy. Nev. 1981), is particularly applicable to the present case. The debtor had 22 creditors as of the involuntary petition date. One of the creditors was the petitioner and two other creditors were insiders. The other creditors were "trade creditors," or creditors involved in the debtor's daily business affairs. After the petition was filed, the debtor paid off all of its trade creditors and only three major debts remained unpaid, including two claims held by insiders of the debtors. Nevertheless, the Court held that under the circumstances, the debtor was generally not paying its debts as they became due.

Similarly, in *In re Midwest Processing Company,* 41 B.R. 90 (Bkrtcy. N.D. 1984), *reversed on other grounds,* 47 B.R. 903 (1984), the Court held that the debtor was not generally paying its debts as they became due because

the debtor had, in effect, ceased operations, had been operating at a loss for several years prior to the filing of the involuntary petition, had shown a substantial dollar decrease in assets in the several years prior to the filing of the petition, and was unable to pay large claims on long-term obligations. It should be noted that the debtor in *Midwest Processing* had generally been paying its bills on a current basis. This case emphasizes the importance of considering the debtor's financial history, which includes the nonpayment of long-term debts in determining the solvency of a debtor. Thus, the Bankruptcy Court should have seriously considered the bankrupt's long-term debts before concluding that the bankrupt was solvent.

Notwithstanding the Bankruptcy Court's failure to consider the long-term debts in reaching its conclusion concerning the bankrupt's solvency, this Court finds that appellants are estopped from declaring forfeiture on grounds of insolvency. Because Judge Collinson introduced the new issue of the debtor's insolvency into the case, Judge Pelofsky was free to consider the trustee's defense of waiver and estoppel which was not considered by Judge Collinson. See, *Perkins v. Standard Oil of California*, 399 U.S. 222, 223, 26 L.Ed.2d 534, 90 S.Ct. 1989 (1970); *Poletti v. CIR*, 351 F.2d 345, 347 (8th Cir. 1965). The Court notes that Judge Pelofsky found that appellants' ground for acceleration and forfeiture was based solely on an alleged default in payments and upon no other ground. Under Missouri law, when a party is invoking a forfeiture or declaring default, the expression of a specific ground in the notice estops the party from later asserting additional grounds. This rule of law is set forth by the Missouri Supreme Court in *Independence Flying Service, Inc. v. Abitz*, 386 S.W.2d 399 (Mo. 1965), where the court stated:

> Nor is the lessor entitled to the enforcement of a forfeiture for breach of the provision of the lease prohibiting the subletting of the written premises without her consent. Lessor asserted only one ground of forfeiture, namely, nonpayment of rent. Her letter declared the lease terminated 'for non-payment of rent and for other violations by the lessee of the lease agreement,' but the generality 'other ground' is insufficient notice of forfeiture on the ground of violation of a covenant against subletting. Lessee is entitled to know specifically upon what grounds lessor asserts the right to declare a forfeiture. 'The assertion of one ground of forfeiture, so as to terminate the tenancy, precludes the right to rely on another ground which existed at the same time, in an action involving a question of forfeiture. . .' Having first asserted this ground of forfeiture in her answer to this suit for conversion, she is estopped to claim the forfeiture for this ground.

386 S.W.2d at 404. Because forfeiture of a lease or contract for breach of a covenant is a harsh remedy, forfeitures are not favored by the courts. *Haeffner v. A.P. Green Fire Brick Corp.*, 76 S.W.2d 122, 126 (Mo. 1935). A covenant permitting forfeiture will be strictly construed against the party seeking forfeiture. *Frank v. Dodd*, 130 S.W.2d 210, 215 (Mo. App. 1939). Having failed to assert any grounds other than nonpayment in its notice of forfeiture and petition for reclamation, appellants have waived their right to declare forfeiture on the ground of insolvency.

The evidence is clear that as of May 9, 1977, Caleb Lipscomb knew that the bankrupt was insolvent and headed for bankruptcy. Caleb testified that in the late spring of 1976 he began hearing rumors about the bank-

rupt's operations and problems it was having. He was advised by vendors that the bankrupt was delinquent on bills for merchandise and services which the bankrupt had purchased. Mr. Lipscomb had to personally guarantee a large quantity of accounts payables in order to obtain credit from suppliers and vendors. Mr. Lipscomb further testified at the May 13, 1977 adjudication hearing that when the bankrupt began to hold up payment as regards accounts payables of the bankrupt/Aggieville, Caleb had to demand that the board of directors allow him signature authority. This was accomplished in January 1977. At that time, Caleb became involved in the day-to-day operations of the business.

On February 25 or 26, 1977, Mr. Lipscomb, on behalf of Edwin and Lipscomb Farms, Inc., made demand for payment on a promissory note dated November 10, 1976. This demand was made on Dave Gamble, chief accountant for the bankrupt, and upon the Board of Directors and to Mr. Wes Chase, then-president. Mr. Chase responded that the bankrupt did not have the money to pay the note. Mr. Lipscomb made ongoing requests thereafter and the response was always the same. Mr. Lipscomb also testified that he became aware prior to May 9, 1977 that Farmers Market Association had filed for bankruptcy. He was also aware that Farmers Market Association was a debtor to the bankrupt in a rather large amount and that the bankrupt had guaranteed two notes to Associated Grocers on behalf of Farmers Market Association and that demand for payment had been made by Associated Grocers upon the bankrupt to pay under the terms of the notes. It should further be noted that Mr. Lipscomb had his office at the East Trafficway location, the main office of the bankrupt. He had moved there in the spring of 1976 and remained there until May 7, 1977.

During April of 1977 and the first week of May, 1977, Mr. Lipscomb had continuous meetings with the bankrupt's officials and board members concerning the bankrupt's financial status and its intention to file bankruptcy. On May 5, 1977, Wes Chase gave a memo to Mr. Lipscomb instructing him that he no longer had checkwriting authority. Caleb testified that this memo confirmed his feelings that the bankrupt was insolvent. It is clear, therefore, that appellants had notice of the bankrupt's insolvency prior to giving the bankrupt the notice of forfeiture.

In addition, this Court upholds Judge Jones' finding, which was affirmed by Judge Collinson, and found by Judge Pelofsky that the bankrupt had a right to rescind the contract for Lipscomb's failure to transfer good and marketable title to the four lots in Liberal, Missouri. All three judges found that the contract for the sale of Aggieville was a "package deal" for all of the realty and personalty involved. The evidence is clear that the contract required Aggieville to transfer the marketable title to certain realty to the bankrupt. Additionally, there is no dispute that marketable title was never transferred by Aggieville to the bankrupt for certain realty. Under Missouri law, the law found to be applicable by Judge Collinson, a party to a contract cannot seek from the other party benefits where he is the first to violate the contract. *Boten v. Brecklein*, 452 S.W.2d 86, 92 (Mo. 1970); *S.G. Adams Painting and Stationery Company v. Central Hardware Company*, 572 S.W.2d 625, 629 (Mo. App. 1978). The Eighth Circuit has also adopted this rule when considering questions of Missouri law. See, *Nevato v. Sletten*, 560 F.2d 340 (8th Cir. 1977); *Kempner v. Goddard Grocer Co.*, 5 F.2d 807 (8th Cir. 1925). Since Aggieville did not clear all liens on the realty to be transferred to the bankrupt, this Court finds that Aggieville materially breached its

contract with the bankrupt and is barred from claiming benefits under the contract for a later breach by the bankrupt, whether the breach consisted of nonpayment or insolvency.

This Court further upholds the Bankruptcy Court's ruling concerning the trustee's right to recover $458,825.10 plus interest. Judge Jones' opinion sets forth a detailed analysis of what Aggieville gave to the bankrupt and what Aggieville received in return. Judge Jones first noted that Lipscomb has all the real estate and has never deeded any of it to the bankrupt. Lipscomb admitted that the real estate has increased in value. In addition, when Lipscomb sold to the bankrupt, the inventory was $557,000 and when he took over on May 9, 1977, the inventory had increased to $660,000. Therefore, Judge Jones found that Lipscomb is $103,000 better off in inventory.

Judge Jones did, however, note that this is not the "true picture." Judge Jones found that when the bankrupt took over from Lipscomb on December 1, 1975, Lipscomb had purchased and paid for $137,687.24 worth of twine. The twine arrived throughout 1976 and was added to the inventory. Bankrupt paid Lipscomb with a note for $137,687.24 which remains totally unpaid to this date. Judge Jones then added $137,687.24 to the inventory purchased by the bankrupt on December 1, 1977 of $557,000 and found that Lipscomb had made a total investment of $694,687.24. Based upon this calculation, Judge Jones found that Lipscomb received back $34,687.24 less in inventory than he furnished the bankrupt. Judge Jones further noted that on May 10, 1977, Lipscomb assumed an $11,531.14 overdraft. Judge Jones found that the fixtures and equipment which were estimated by Lipscomb to be worth about $10,000 are the same subject to reasonable wear and tear for 17 months. Judge Jones further found

that after the initial transaction, Lipscomb loaned the bankrupt $50,000 and $60,000 in accounts receivable. Thus, when the bankrupt took bankruptcy, it owed Lipscomb $110,000 on these two notes secured principally by accounts receivable. On May 10, 1977, Lipscomb took over the accounts receivable in the amount of $220,000. Judge Jones then noted that even if one assumes that 10% of the accounts are bad, Lipscomb has been overcompensated $100,000 which adequately compensates him for the loss in inventory of $34,687.24 in any fixtures and equipment depreciation.

Finally, Judge Jones concluded that Lipscomb received a reasonable rental on the real estate and equipment. He found that the real estate and equipment sold for $960,000. After acknowledging that there was no evidence as to what a reasonable rental of the property is, he used the liberal figure of 10% per year rental and found that a reasonable rental for one year would be $96,000 or $8,000 per month, or $152,000 for seventeen months. He notes that Lipscomb testified that the interest paid him by bankrupt during this period was $162,207.11 which would offset a reasonable charge for rental.

There is substantial evidence to support Judge Jones' finding that the parties will be placed in status quo if appellants are allowed to keep the property and pay the trustee $458,825.10 plus interest. This Court sees no reason to disturb the findings of Judge Jones at this point. Therefore, it is hereby

ORDERED that the Order of the Bankruptcy Court is affirmed.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: September 26, 1986

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2340

In Re: Progressive Farmers Association, Debtor, South Central Enterprises, Inc., and Edwin M. Lipscomb Farms, Inc., and Caleb Lipscomb, and Ellen Lipscomb, Appellants, v. Richard Farrington, Trustee, Appellee.	)	Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 11, 1987
Filed: September 23, 1987

Before ROSS,* and WOLLMAN, Circuit Judges, and BRIGHT, Senior Circuit Judge.

WOLLMAN, Circuit Judge.

South Central Enterprises, Inc., Edwin M. Lipscomb Farms, Inc., and Caleb and Ellen Lipscomb (appellants)

*The Honorable Donald R. Ross was an active judge of the Eighth Circuit on the date this case was submitted, but took senior status on June 13, 1977, before the decision was filed.

appeal from a district court order[1] affirming a decision of the bankruptcy court granting rescission of a contract for the sale of an agricultural supply business from appellants to the Progressive Farmers Association. We affirm.

I.

This action arises out of appellants' sale of their agricultural supply business (Aggieville) in early December 1975 to the Progressive Farmers Association[2] (hereinafter Progressive), a Missouri farm cooperative. Aggieville is located in the Missouri towns of Springfield, Liberal, and Monett, and consists of a farm supply store, a grain elevator, a fertilizer plant, and associated agricultural enterprises. At the time of the sale, Aggieville was operated and owned in part by Caleb Lipscomb (Lipscomb). Lipscomb continued to manage Aggieville after it was sold to Progressive.

The contract for the sale of Aggieville, which was evidenced by three written agreements and promissory notes, was a "package deal." The contract required Progressive to pay $60,000 down on the purchase price of Aggieville and the remaining $840,000 in monthly install-

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1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

2. Progressive was organized as a farm cooperative under Missouri law. Progressive claimed to be the direct link between the farmer and the farmer's supplier, cutting out the middle man, with the result that the farmer could reduce his costs by joining Progressive and buying supplies directly from the association. The primary emphasis of Progressive, however, was on the sale of "Estate Builder" securities. Progressive promised large payoffs for those farmers who invested money in these securities. In reality the investment was a classic "Ponzi" scheme, one in which the victim pays the money up front in return for expected benefits that never materialize. The principals behind the Progressive organization were convicted of SEC violations. In the course of its operation, however, Progressive did acquire some legitimate businesses, one of which was Aggieville.

ments of interest and principal, which were due on the first of each month with a five-day grace period. The contract further provided that appellants were to furnish Progressive with abstracts of good and marketable title to the real estate. If Progressive objected to the abstracts of title submitted and if appellants were unable or unwilling to cure such objections, the contract could be annulled at Progressive's option.

After signing the contract, appellants tendered to Progressive abstracts of title to the Aggieville real estate. Progressive verbally objected to the abstracts to the Liberal real estate, alleging that four of the lots in the center of the Liberal property were not entirely owned by appellants and that a building not subject to the contract stood in part on the Liberal real estate. After Progressive complained to appellants about the defect in the title, it agreed to appellants' proposal that the defect be cured after the resolution of a lawsuit involving the Liberal real estate.[3] In December of 1976 that lawsuit was settled and a short time thereafter Progressive again complained about the alleged defect in the title to the Liberal property. Appellants, however, failed to cure the defect in the title. About this same time, Progressive began tendering its installment payments on the promissory notes. Despite the payment schedule set forth in the notes, Progressive consistently made late payments well after the 6th of the month.[4] Appellants never de-

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3. Caleb Lipscomb was an owner of only a one-third interest of the four lots located in Liberal, Missouri. His two sisters owned the other two-thirds interest. The alleged problem with clearing title was an existing dispute between Caleb and his sister, Erlene Lasley.

4. Payment on the February note was made on February 28, 1977; the March payment was made on March 31, 1977; and the payment due in April was made on April 18, 1977.

clared or threatened to declare a default on any of the notes until May of 1977.

Progressive failed to tender the May installment payment on its May 6, 1977, due date. On May 9, 1977, appellants, stating that Progressive was in default on its obligations, foreclosed their security interest in Aggieville. Progressive filed its petition in bankruptcy court four days later. At no time did Progressive ever tender to appellant the May 1977 installment payment, nor did appellants ever tender to Progressive the deeds to any of the Aggieville real estate.

On May 25, 1977, appellants filed in the bankruptcy court their petition for the reclamation of all of the Aggieville property. The trustee in bankruptcy counterclaimed, seeking rescission of the contract for the sale of Aggieville from appellants to Progressive.

The bankruptcy court granted the trustee's prayer for rescission on the ground that appellants' failure to deliver good and marketable title to the Aggieville real estate was a material breach of the agreement that entitled Progressive to rescind. Appellants appealed, and the district court[5] vacated the bankruptcy court's judgment. The court held that Progressive's failure to tender the May 1977 installment was not a default entitling appellants to foreclose their security interest in Aggieville. It remanded the action for further findings, however, so that the bankruptcy court could determine whether Progressive was otherwise in default on or before May 9, when appellants foreclosed on their security agreement in Aggieville. Specifically, the court stated that it was remanding for a

5. The Honorable William R. Collinson, United States Senior District Judge for the Eastern and Western Districts of Missouri.

finding as to whether Progressive was, on May 9, 1977, actually insolvent. The district court instructed that if the bankruptcy court on remand found that Progressive was insolvent or otherwise in default of its obligations under the security agreement before the time of foreclosure, appellants were entitled to foreclose their security interest in Aggieville, and the trustee's counterclaim for rescission should be denied.

Some sixty-five months later, the bankruptcy court[6] issued a memorandum opinion finding that Progressive was neither in default of its obligations under the security agreement nor insolvent on May 9, 1977. *In re Progressive Farmers Ass'n*, 50 Bankr. 525 (Bankr. W.D. Mo. 1985). Therefore, in accordance with the directions of the district court the bankruptcy court held that appellants were not entitled to foreclose and granted the trustee's motion for rescission. The bankruptcy court, based on the findings of the initial bankruptcy proceeding, entered judgment in favor of Progressive in the amount of $485,825.10 plus interest. Appellants again appealed. The district court found that there was no substantial evidence to support the bankruptcy court's finding that Progressive was not insolvent on May 9, 1977. The court held, however, that appellants had waived their right to declare forfeiture on any other ground, including insolvency, since they had failed to assert any other grounds other than nonpayment in their notice of forfeiture and petitions for reclamation. The district court therefore affirmed the bankruptcy court's finding that Progressive had a right to rescind the contract due to appellants' material breach of the Aggieville contract by failing to transfer good and marketable

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6. The Honorable Jack Jones, now deceased, issued the original bankruptcy opinion, while the case on remand was heard by his successor, the Honorable Joel Pelofsky.

title to the four lots in Liberal, Missouri. The district court further upheld the bankruptcy court's ruling concerning the trustee's right to recover $458,825.10 plus interest from appellants. This appeal followed.

II.

A. Jurisdiction.

The first issue that must be addressed is the jurisdiction of this court to decide this dispute. Appellants argue that the bankruptcy court erred in asserting jurisdiction over the proceedings after the case was remanded by Judge Collinson due to the Supreme Court's intervening decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In that case, the Supreme Court found unconstitutional the vesting of the district court's bankruptcy jurisdiction over bankruptcy judges, who are not Article III judges, in the context of the bankruptcy court's adjudication of state law claims. *Id.* at 87-88. Appellants assert that the questions of insolvency and anticipatory breach, which the district court instructed the bankruptcy court to make a determination as to on remand, were questions of state law and required the exercise of judicial power beyond the authority of a bankruptcy judge in light of the holding in *Northern Pipeline.*

The present action was commenced under the Bankruptcy Act of 1898, the Bankruptcy Reform Act not having been enacted until 1978.[7] The Supreme Court's holding in *Northern Pipeline,* however, reaches only the grant of in-

7. Unless otherwise indicated, all statutory references are to the Bankruptcy Act of 1898 as amended and in effect at the date of filing. Likewise, Bankruptcy Rule references are to the old Bankruptcy Rules.

dependent jurisdiction to a bankruptcy court under the statute enacted in 1978. It does not deal with the question of the validity of the derivative jurisdiction exercised by bankruptcy referees under the Bankruptcy Act of 1898. *Northern Pipeline,* 458 U.S. at 80 n.31. The Court in *Northern Pipeline* concluded only that:

> 28 U.S.C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

458 U.S. at 87-88.

The controlling jurisdictional provision under the 1898 Act states that:

> Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, *unless by consent of the defendant* * * *.

11 U.S.C. § 46(b) (emphasis added).

We find that appellants consented to the summary jurisdiction of the bankruptcy court and therefore cannot now raise the issue of the bankruptcy court's jurisdiction over a counterclaim that is reasonably related to the claim submitted by appellants. *See Flora Realty & Inv. Co. v. Steem Elec. Corp.*, 128 F.2d 338, 340 (8th Cir. 1942). Appellants voluntarily submitted to the bankruptcy court their petition for the reclamation of Aggie-

ville. The trustee in bankruptcy then filed an answer and counterclaim in which he prayed for rescission of the contract. Appellants then responded to the trustee's counterclaim by means of a reply that addressed the merits of the trustee's contentions but which did not raise any jurisdictional objection or defense. Appellants did not make any jurisdictional objection at trial. It was not until four months after trial that appellants made their first objection to jurisdiction.

Accordingly, we conclude that the bankruptcy court on remand properly exercised jurisdiction over the proceedings.

B. Rescission of the Aggieville Contract.

1. Law of the Case

Appellants next argue that the district court erred in holding that bankrupt was entitled to rescission of the Aggieville contract. Appellants assert that once the district court found the bankruptcy court's determination that Progressive was not insolvent on the date of foreclosure to be clearly erroneous, it was required by "the law of the case," set out by Judge Collinson in his remand order, to hold that appellants were entitled to foreclose their security interest in Aggieville and deny the trustee's counterclaim for rescission. We do not agree.

On remand, the bankruptcy court found that Progressive was not insolvent on May 9, 1977. It also found that Progressive was not in default on any terms, condition, or obligation imposed upon it by the various security agreements. On appeal, Judge Clark set aside as clearly erroneous the bankruptcy court's finding that Progressive was not insolvent, holding that the bankruptcy

court had failed to utilize the correct test of insolvency and erroneously applied the test which it did use. Appellants argue that under the law of the case set out by Judge Collinson on his remand order, namely, "that if bankrupt were insolvent on May 9, 1977, appellants were excused from the duty of tendering title to the real estate, and the trustee's counterclaim for rescission must be denied," the district court was required to deny the trustee's counterclaim for rescission once it found Progressive to be insolvent.

"The law of the case" doctrine generally requires that a decision on a former appeal be followed in any subsequent proceedings in that court or a lower court unless evidence subsequently introduced is substantially different or the decision is clearly erroneous and works manifest injustice. *See Liddell v. State of Missouri,* 731 F.2d 1294 (8th Cir.), *cert. denied,* 469 U.S. 816 (1984); *United States v. Unger,* 700 F.2d 445 (8th Cir.), *cert. denied,* 464 U.S. 934 (1983); *Continental Bank & Trust Co. v. American Bonding Co.,* 630 F.2d 606, 608 (8th Cir. 1980). The doctrine is a rule of practice rather than a command to the courts. *Otten v. Stonewall Ins. Co.,* 538 F.2d 210, 212 (8th Cir. 1976).

As we see it, the law of the case doctrine has no application in this case. Judge Collinson interjected the question of Progressive's insolvency *vel non* on his own motion. He said nothing about the doctrine of waiver of grounds for forfeiture or foreclosure. In the event, Judge Clark's ultimate holding treated the question of Progressive's insolvency as irrelevant inasmuch as appellants had waived it by failing to assert it in its complaint for foreclosure. Given the tortuous (and inexcusably

prolonged) procedural path this case has traversed, we are loath to read into Judge Collinson's order more than appears there.

2. Waiver

Appellants next argue that the district court erred in finding that they had waived their right to declare forfeiture on the ground of insolvency. The district court found that since appellants failed to assert any ground other than nonpayment in their notice of forfeiture and petition for reclamation, they had waived their right to declare forfeiture on any other ground. Appellants assert that no principle of law required them to designate each ground of default in their notice of foreclosure.

The remedy of forfeiture under Missouri law is a harsh remedy and is not favored by the courts. *In re Estate of Kraeuchi,* 729 S.W.2d 566, 568 (Mo. App. 1987); *Housing Auth. of City of Mansfield v. Rovig,* 676 S.W.2d 314, 316 (Mo. App. 1984). A covenant permitting forfeiture will be strictly construed against the party seeking forfeiture, *Frank v. Dodd,* 130 S.W.2d 210, 215 (Mo. App. 1939), and both the letter and spirit of the law must be complied with before a court will permit forfeiture. *Rovig,* 676 S.W.2d at 316. *See State v. Jones,* 637 S.W.2d 337, 338 (Mo. App. 1982).

The bankruptcy court on remand found that appellants' ground for acceleration and forfeiture was based solely on alleged default in payments. The court stated that "the notice delivered on May 9, 1977, and the testimony offered at the 1977 hearing demonstrates clearly that Lipscomb's attempt to accelerate was based upon an alleged default in payment and upon no other ground."

Op. at 23. The court noted that while the language of the notice of foreclosure[8] is broader, it can be fairly read as simply detailing the remedies Lipscomb intended to utilize because of the default in payment. This finding was affirmed on appeal by the district court.

Substantial evidence exists to support the finding that appellants relied solely on a default in payment in declaring a forfeiture. The record reveals that appellants had notice of Progressive's financial troubles as early as the spring of 1976 but failed to declare a forfeiture until May of 1977. In January of 1977, moreover, Caleb Lipscomb took active control of the Aggieville operation and had full access to Aggieville records, including the authority to pay all bills, but waited until he received notice that he would no longer have checkbook authority over Aggieville to declare Progressive in default on its payments. Furthermore, appellants failed to assert any ground other than nonpayment in their notice of forfeiture and their petition for reclamation. Based on such evidence, we cannot say that the bankruptcy court's finding that appellants relied solely on default in payment in declaring forfeiture is clearly erroneous.

Under Missouri law the expression of a specific ground in the notice of forfeiture or declaration of default precludes the later assertion of additional grounds. *Independence Flying Service, Inc. v. Abitz*, 386 S.W.2d 399 (Mo. 1965); *Rovig*, 676 S.W.2d at 317. *See also Morris v.*

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8. Appellants' notice of foreclosure states:

> [T]he undersigned do hereby give notice to Progressive Farmers Association that by reason of default in the terms of said security agreements and promissory notes that the undersigned have and will take possession of all collateral for the payment of said notes as granted them by said security agreements[.]"

Reed, 510 S.W.2d 234, 240 (Mo. App. 1074) (once insurer denies liability on a given ground, it may not thereafter defend on different grounds). In *Abitz*, the Missouri Supreme Court held in a landlord-tenant dispute involving a question of forfeiture that the assertion of one ground of forfeiture precluded the right to rely on another ground even though it existed at the same time. *Abitz*, 386 S.W.2d at 404. Accordingly, because appellants relied solely on nonpayment in declaring a forfeiture, they are now precluded from declaring forfeiture on any other ground. We therefore need not address the issue of whether Progressive was insolvent at the time of foreclosure.

The next issue that must be addressed is whether appellants were justified in declaring a forfeiture due to Progressive's late payment.

Appellants argued at the initial bankruptcy trial that Progressive was in default of its contractual obligation because it failed to tender the May 1977 installment payment on or before May 9, 1977. The bankruptcy court found that by previously accepting Progressive's late payments appellants had waived their right to payment by the 6th of the month and that the contract was thereby modified to permit Progressive a reasonable time in which to make the monthly payments. The district court affirmed, concluding that the findings were supported by substantial evidence. We agree.

In *Fritts v. Cloud Oak Flooring Co.*, 478 S.W.2d 8, 12 (Mo. App. 1972), the court stated:

> "Where a contract expressly provides that 'time shall be of the essence,' or that in case of nonpayment of an installment on time the rights of the obligor shall

> be forfeited, or that in such case the obligee may declare a forfeiture, performance on time is thereby made a condition of the obligor's reciprocal rights under the contract. But the courts do not favor forfeitures . . ." and "[t]o avoid such a forfeiture, the courts have been very astute to find and declare the existence of a waiver or an estoppel." 3A Corbin on Contracts § 754, p. 489. "Any expressions or conduct of the obligee that leads the obligor reasonably to believe that performance on time will not be insisted on will operate as a waiver of the time condition, as to subsequent defaults as well as to antecedent ones. Such a belief by the obligor may be reasonable where it is induced by the obligee's receipt of a series of delayed payments without objection." Id. § 754 at pp. 494-495.

The court further stated that where a party acquiesces in the making of belated payments, in departure from the express terms of the contract, for a length of time and under circumstances establishing a course of dealing upon which the party may rely, the party cannot declare a forefeiture, but must, to make use of the right to forfeit, first warn the other party of his intentions to make use of the right as to future payments. *Fritts,* 478 S.W.2d at 12-13.

Appellants clearly acquiesced in Progressive's late payments. Progressive consistently made late payments on the notes, some as much as twenty to twenty-five days late, to which appellants made no objection. In order to declare a forfeiture because of late payments, appellants were required to first give notice of such intent. Having failed to do so, they waived their right to declare such a forfeiture. Consequently, Progressive's failure to tender

the May 1977 installment payment by May 9, 1977, was not a default entitling appellants to foreclose their security interest in the Aggieville property.

The next question is whether Progressive was entitled to rescind the contract due to a material breach by appellants.

There is no dispute among the parties that marketable title to four lots of the Liberal tract was never obtained by appellants. Lipscomb himself admitted that he knew of the defects in the title. The dispute is whether this constituted a material breach of the contracts.[9] For a breach of a contract to justify rescission, it must relate to a vital provision going to the very substance or root of the agreement and cannot relate simply to a subordinate or incidental matter. *McCullough v. Newton*, 348 S.W.2d 138, 142 (Mo. 1961); *B & B Equipment Co., Inc. v. Bowen*, 581 S.W.2d 80, 85-6 (Mo. App. 1979); *Hartley v. Williams*, 287 S.W.2d 129, 135 (Mo. App. 1956).

Under Missouri law a vendor must always furnish the exact title called for by his contract. *Aker v. Lipscomb*, 300 Mo. 303, 253 S.W. 995, 996 (1923); *Hartley*, 287 S.W.2d at 134. In *Hartley*, the vendor failed to furnish an abstract showing merchantable title, as required by the contract. The Missouri Court of Appeals held that this failure was a breach which went to the very root of the contract and warranted rescission. *Id.* at 135.

A similar situation is present here. The contract provided that appellants were to furnish Progressive with

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9. The parties agree that the trustee in bankruptcy stands in the shoes of Progressive and can only be successful in its efforts to rescind the contract if Progressive could have been successful. 11 U.S.C. § 110(a)(6); *Cissel v. American Home Assurance Co.*, 521 F.2d 790, 792 (6th Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

title for all the Aggieville property free and clear of any and all liens and encumbrances. No deeds, however, to any of the real estate were ever tendered to Progressive because the parties agreed that the real estate would not be transferred until all the titles were marketable. It is clear from this that both parties believed that deeding title free and clear of any encumbrances to all of the Aggieville property was a provision going to the very root of the agreement. The record further reveals that although notice of the defect was not communicated in writing to appellants, notice was timely communicated and Lipscomb was aware of its importance. Lipscomb knew that Progressive refused to take title to any of the real estate until the Liberal tract could be deeded free and clear. Based on this evidence, we conclude that appellants were guilty of a material breach that entitled Progressive to rescind the contract.

C. Damages.

Appellants also argue that the district court erred in sustaining the bankruptcy court's finding regarding the amount of damages awarded to Progressive. The bankruptcy court's ruling on the issue of damages is a thorough and detailed analysis of the factual situation between appellants and Progressive.[10] As an appellate court, our scope of review over a damage award is narrow and we may not reverse except for a manifest abuse of discretion.

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10. Appellants argue that Judge Collinson's remand order vacated the original bankruptcy court's judgment on damages and that therefore the bankruptcy court on remand could not rely on such findings regarding the amount of damages recoverable by Progressive. We find no support for such a proposition in law or in Judge Collinson's opinion. On remand, the bankruptcy court was free to reinstate the original bankruptcy court's judgment and rely on its finding and conclusions regarding the amount of damages recoverable by Progressive.

See American Business Interiors Inc. v. Haworth, Inc., 798 F.2d 1135 (8th Cir. 1986). We cannot say that the bankruptcy court abused its discretion in its ruling on damages.

We have carefully reviewed appellants' other assertions of error and find them to be without merit. Accordingly, we affirm the judgment of the district court affirming the bankruptcy court's decision granting rescission of the Aggieville contract.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2340-WM

South Central Enterprises, Inc., et al., Appellants,	)	Appeal from the United States District Court for the Western District of Missouri
vs.	)	
Richard Farrington, Trustee, Appellee.	)	

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 23, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX G

TRANSCRIPT EXCERPTS OF REMAND PROCEEDINGS

* * * [76] tried today. The only issue to be tried today is the issue of insolvency and, again, I could see how Lipscomb's state of mind—Caleb Lipscomb's state of mind on April 18th, 1977, bears on his relationship, of course, with PFA and—

THE COURT: —Well, as I've indicated before, I will receive these documents for the narrow ground that they're offered. To point out again, I'm not certain exactly at what point this is going to be resolved. The remand suggested at least two issues that ought to be considered. One was the question of whether there was valid ground for declaration of forfeiture and the other was whether insolvency excuses performance on the part of the seller. The theory, of course, is directed primarily to the issue of insolvency. However, since we are considering the other aspects of the remand, and I'm not suggesting that we're going to do that in theory now, Mr. Knauer, although you may want to take the position that you're not fully prepared on that issue, I'm going to receive the testimony. Go ahead, Mr. Sullivan.

Q. (BY MR. SULLIVAN) I'll hand you what has been marked as defendants' exhibit K. Would you look at that document and tell the Court what that document is?

* * *

* * * [307] that deposition.

THE COURT: All right.

MR. McMANUS: As well as plaintiffs' exhibit four.

MR. KNAUER: What's exhibit two, the transcript?

MR. McMANUS: Two is the transcript.

MR. KNAUER: I'm going to fuss like the devil about that transcript.

THE COURT: Well, I understand that. They're just putting what's at stake now. I'm not making any ruling on it now. Now, there's something that I need to clarify. It kind of occurs to me as we progress through this, that the issues of whether Mr. Lipscomb or Mr. Lipscomb's representatives of various interests, on the issue of his conduct on declaring a forfeiture and the issue of whether or not there was insolvency such as would excuse performance are interrelated. We're heard a great deal of testimony today and will hear more testimony on those issues. I think what I'm going to do, is to amend my previous order and broaden it so that we will be dealing not only with the question of insolvency excusing performance, but also the question of solvency or whatever else justified—may have justified this declaring of forfeiture.

[308] I think we've spent most of the time introducing that evidence along with others things and until all the other witnesses, I don't think anybody is terribly handicapped. I don't think there's that much additional questions that is in issue and I will allow you to get prepared so that when we finish the hearing, we can deal with that. It may require Mr. Lipscomb to come back on the stand, although I don't think it should. I would certainly allow that, if you need to clarify a question.

MR. KNAUER: That's certainly agreeable with the trustee, Your Honor. In fact, the trustee would more that you broaden your order setting this hearing on the subject of insolvency to include the other issues which

we've been prepared to—that we've often tried to plead, but have been prevented from doing so. The plaintiffs refusal to incorporate Judge Collinson's insolvency issue into the pleadings and I'm referring to the issue of waiver and estoppel to declare forfeiture on any ground other—

THE COURT: —Well, let's go off the record. We're going to be talking philosophically here.

(A DISCUSSION OUTSIDE OF THE RECORD WAS HAD AND PROCEEDINGS RESUME AS FOLLOWS):

[309] THE COURT: Prior conference with counsel off the record, the Court indicated that there were two issues of remand contained in the opinion of the District Court. Since a great deal of testimony has been introduced at this point that dealt with the questions of whether insolvency or other issues provided a basis for the forfeiture and also whether or not insolvency excused further performance, that the further proceedings that the Court intended to have in this matter will address both of those issues so that both could be resolved by the opinion of the Court at the close of the testimony.

I think it can be fairly stated that Mr. Knauer on behalf of the trustee agreed to the broadening of the hearing, is that correct?

MR. KNAUER: That is correct, absolutely, and we would request the Court to go further and permit us to argue the issues of waiver and estoppel which we have been prevented from pleading in this Court by the recalcitrance of the plaintiff to anyway amend the pleadings to recognize that an issue of insolvency is presented—

THE COURT: —All right, the Court declines to broaden beyond those issues. Mr. McManus, did you have a statement?

* * *